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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 40

EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, ET AL., PETITIONERS,

vs.

KENTUCKY UTILITIES COMPANY

No. 50

POWELL VALLEY ELECTRIC COOPERATIVE, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY

No. 51

TENNESSEE VALLEY AUTHORITY, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 40 PETITION FOR CERTIORARI FILED JANUARY 11, 1967
NO. 50 PETITION FOR CERTIORARI FILED FEBRUARY 16, 1967
NO. 51 PETITION FOR CERTIORARI FILED FEBRUARY 16, 1967
CERTIORARI GRANTED MARCH 27, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 40

EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, ET AL., PETITIONERS,

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KENTUCKY UTILITIES COMPANY

No. 50

POWELL VALLEY ELECTRIC COOPERATIVE, PETITIONER,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 4—Memorandum from C. Wilson House to James E. Watson, dated June 12, 1961 with attachments	1274	855
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	Original	Print
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No. 17—Memorandum from Paul S. Button to Manager's Files, dated December 5, 1962 (Exhibit No. 77)	1338	917
No. 18—Memorandum from L. J. Van Mol to G. O. Wessenauer, dated December 10, 1962 (Exhibit No. 78)	1340	920
No. 19—Letter from C. Wilson House to Ralph B. Miner, dated December 14, 1962 (Exhibit No. 79)	1341	921
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No. 21—Letter from C. Wilson House to Ralph B. Miner, dated May 28, 1963	1347	927
No. 22—Memorandum from C. Wilson House to Paul S. Button, dated June 20, 1963 (Exhibit No. 80)	1348	928
No. 23—Letter from C. Wilson House to Paul S. Button, dated August 27, 1963; letter from Ralph B. Miner to C. Wilson House, dated August 26, 1963 and letter from E. J. Hardin, III to Ralph B. Miner, dated August 14, 1963 (Exhibit No. 81)	1349	929
No. 24—Letter from C. Wilson House to Ralph B. Miner, dated August 30, 1963	1352	932
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No. 26—Letter from C. Wilson House to Ralph B. Miner, dated September 23, 1963; letter from C. Wilson House to Paul S. Button, dated September 16, 1963; letter from Ralph B. Miner to C. Wilson House, dated September 13, 1963 and letter from the Mayors of the towns of Tazewell and New Tazewell, dated September 11, 1963 (Exhibit No. 82)	1354	934

	Original	Print
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No. 28—Letter from C. Wilson House to Paul S. Button, dated April 10, 1964 and letter from Ralph B. Miner to Norman M. Clapp, dated April 3, 1964	1359	939
No. 29—Letter from C. Wilson House to Ralph B. Miner, dated May 5, 1964	1364	943
No. 30—Letter from Ralph B. Miner to C. Wilson House, dated March 18, 1964 (Exhibit No. 84)	1365	945
No. 31—Letter from C. Wilson House to Ralph B. Miner, dated March 26, 1964	1366	947
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Record from the United States District Court for the Eastern District of Tennessee, Northern Division—Continued

	Original	Print
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No. 11—Notes on meeting held February 12, 1963 between representatives of TRECA and Powell Valley Electric Cooperative in Nashville (Exhibit No. 65)	1382	962
No. 12—Letter from William H. Callaway to Ralph B. Miner dated August 29, 1963 (Exhibit No. 66)	1383	964
No. 13—List of Tazewell-New Tazewell Power Board Accounts as of August 21, 1964 (Exhibit No. 67)	1385	966
No. 14—Summary by Ralph B. Miner of his knowledge of the Tazewell-New Tazewell Power Situation, undated	1386	967
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No. 1—Map—Section 1—Portion of "Rowe-Osborne" map showing area surrounding Tazewell and New Tazewell, Tennessee. See Volume I, Sheet 4b		
No. 2—Map—Section 2—Approved map showing agreed territorial boundary lines between Kentucky Utilities Co. and Powell Valley R.E.C.C. in Tenn."	1390	973

[fol. 1] CIVIL DOCKET

IN THE UNITED STATES DISTRICT COURT

Pre-trial No. 1177 (9-10-64)

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY,

vs.

TENNESSEE VALLEY AUTHORITY; POWELL VALLEY ELECTRIC COOPERATIVE; EDWARD J. HARDIN, Individually and as MAYOR OF TAZEWELL, TENNESSEE; JAMES B. DEBUSK, Individually and as MAYOR OF NEW TAZEWELL, TENNESSEE.

Attorneys for plaintiff: Malcolm Y. Marshall, James S. Welch, Ogden, Robertson & Marshall, 610 Marion E. Taylor Bldg., Louisville 2, Kentucky. John A. Rowntree, Claude K. Robertson, Fowler, Rowntree & Fowler, 1412 Hamilton Bank Bldg., Knoxville, Tenn. James D. Estep, Jr., Tazewell, Tennessee.

Attorneys for defendant: William R. Staniter, Tazewell, Tenn. Philip P. Ardery, 906 Kentucky Home Life Bldg., Louisville 2, Kentucky. Clyde W. Cridlin (Powell Valley Elec. Co.), Jonesville, Virginia. Charles J. McCarthy, (General Counsel), Tennessee Valley Authority, Knoxville, Tennessee.

Statistical Record

J.S. 5 mailed Nov. 1963
J.S. 6 mailed Oct. 1964

Basis of Action:

Injunction enjoining defendants from interfering with pl. customer contracts & enjoining TVA from selling or delivering to Powell Valley & permanently enjoining Powell Valley from purchasing or receiving from TVA Electrical power for resale.

Costs

Clerk
Marshal
Docket fee
Witness fees
Depositions

Date 1963	Name or Receipt No.	Rec.	Disb.
Nov. 7	Fowler, Rowntree & Fowler	15.00	
Nov. 8	F & E CD 28		15.00
Dec. 31	Fowler, Rowntree & Fowler Notice of Appeal	5.00	
Dec. 31	F & E CD 35		5.00

[fol. 2] DOCKET ENTRIES

Date 1963	Proceedings	Date Order or Judgment Noted
Nov. 7	Complaint filed.	(1)
Nov. 7	Summons for Powell Valley Electric Cooperative issued and handed to U. S. Marshal for service through Secretary of State, Nashville, Tennessee. (Check for $5.00 attached)	
Nov. 7	2 summons issued and handed to U. S. Marshal.	
Nov. 12	Summons returned executed as to the Tennessee Valley Authority by serving copies on Charles J. McCarthy, General Counsel at Knoxville, Tennessee on November 8, 1963 and filed.	(2)
Nov. 12	Summons returned executed personally served on Edward J. Hardin, individually and as Mayor of Tazewell, Tennessee, and personally served on James B. DeBusk individually and as Mayor of New Tazewell, Tennessee, at Tazewell, Tennessee on November 9, 1963, and filed.	(3)
Nov. 12	Summons returned executed served on C. Miller, Sec. to Sec. of State, Tennessee on November 8, 1963 and filed.	(4)
Nov. 14	Summons returned, served by Secretary of State by registered mail to Powell Valley Electric Corporation, Jonesville, Virginia on Nov. 8, 1963; return receipt card received for said registered letter on Nov. 13, 1963, and filed.	(5)
Nov. 14	Affidavit of Secretary of State filed.	(6)
Nov. 14	Registered return receipt card filed.	(7)
Nov. 21	Answer and Counterclaim of Tazewell and New Tazewell, defendants, filed. Copies served by Attorney.	(8)
Nov. 22	Answer of Powell Valley Electric Cooperative filed. Copies served by Attorney.	(9)
Dec. 3	Entry Appearance James D. Estep, Jr. as counsel for plaintiff, Kentucky Utilities Company filed. Copies mailed by attorney.	(10)
Dec. 12	Reply to counterclaim, filed. Copy mailed attys by attorney.	(11)
1964		
Jan. 6	Answer filed. Copy served by attorney. Conformed copy to TVA.	(12)
April 2	Interrogatories of Defendant Tennessee Valley Authority filed. Copies mailed attorneys by TVA.	(13)
April 15	Order that the time within which plaintiff may serve its answers to interrogatories served upon it by Tennessee Valley Authority on April 1, 1964 be extended to and including May 2, 1964, but this extension shall not delay trial on the merits, entered in Civil Order Book 28, page 286, & filed.	(14)
April 15	Objections to Interrogatories filed. Copy served by attorney.	(15)
April 15	Notice of hearing on plaintiff's objections to interrogatories filed.	(16)
May 2	Answers of Kentucky Utilities Company to interrogatories served by Tennessee Valley Authority, April 1, 1964, filed. Copy served by attorney.	(17)
May 25	Interrogatories to Powell Valley Electric Cooperative, filed. Copies served by attorneys.	(18)

Docket Entries

Date 1963	Proceedings	Date Order or Judgment Noted
Jun. 1	Order allowing defendant, Powell Valley Electric Cooperative until and including June 10, 1964 in which to file objections to interrogatories, and until and including July 1, 1964 to file answers to said interrogatories, entered in Civil Order Book 29, page 30, and filed. (Agreed)	(19)
June 3	Interrogatories to Tennessee Valley Authority filed. Copy served by attorney.	(20)
June 4	Agreed Order allowing TVA until and including July 10, 1964 within which to file answers to interrogatories, entered in Civil Order Book 29, page 44, and filed. Conformed copy to TVA by Clerk.	(21)
June 30	Answers of Powell Valley Electric Cooperative to Interrogatories served by Kentucky Utilities Co., filed. Copy served by attorney.	(22)
July 8	Answers of Defendant Tennessee Valley Authority to Interrogatories Propounded by Plaintiff filed. Copies served by TVA.	(23)
[fol. 3]		
July 30	Notice of taking deposition, filed. Copy served by attorney.	(24)
July 30	Notice of taking deposition, filed. Copy served by attorney.	(25)
July 30	Notice of taking deposition, filed. Copy served by attorney.	(26)
Aug. 11	4 deposition subpoenas for 4 plaintiff witnesses returned executed each personally served on August 4, 1964 at Old and New Tazewell, Tennessee, and filed.	
Sept. 2	Order that the objections of Kentucky Utilities Company to interrogatories Nos. 23 and 24 propounded by Tennessee Valley Authority are sustained, the information Sought by the interrogatories may be considered at pre-trial, entered in Civil Order Book 30, page 11, & filed. Copies mailed attorneys by Clerk.	(27)
Sept. 10	Stipulation and Agreement, filed. Copy served by attorney.	(28)
Sept. 10	Deposition of Ralph E. Miner and exhibits to deposition, filed.	(28a)
Sept. 10	Depositions of Paris T. Coffey, Harry Rowe, E. J. Hardin, III, James B. DeBusk and William R. Stanifer and exhibits to depositions, filed.	(28b)
Sept. 10	Depositions of C. Wilson House and G. O. Wessenauer and Exhibits to Depositions, filed.	(28C)
Sept. 11	Order Pursuant to Pre-Trial, filed. Copies mailed to attorneys by Clerk.	(29)
Sept. 14	Order amending pre-trial order filed. Copies mailed attorneys by Clerk.	(30)
Sept. 18	Brief on behalf of plaintiff, filed. Copy served by attorney.	
Sept. 18	Joint pretrial brief of the defendants, filed. Copy served by attorney	
Sept. 18	Subpoena for 1 plaintiff returned executed personally served at Tazewell, Tenn. on September 17, 1964 and filed.	
Sept. 21	Reply brief of the defendants, filed. Copy served by Attorney.	

Docket Entries

Date 1963	Proceedings	Date Order or Judgment Noted
Sept. 21	Order of trial to the Court without intervention of a jury; part of plaintiff's evidence heard, and Court adjourned to 9 a.m., Tuesday, September 22, 1964; entered in Civil Order Book 30, page 63.	(31)
Sept. 22	Order of trial to the Court continued: Remainder of plaintiff's evidence heard, defendants, and each of them, moved for a dismissal which motion was overruled except the motions made by the defendants, Edward J. Hardin and James B. DeBusk, as individuals which was sustained; part of defendants evidence heard, and Court adjourned to 9 a.m., September 23, 1964, entered in Civil Order Book 30, page 67.	(32)
Sept. 23	Order of trial continued: defendants' evidence heard, court adjourned to 9 a.m. September 24, 1964, entered in Civil Order Book 30, pg 71.	(33)
Sept. 24	Order of trial concluded: Rebuttal, statement of counsel heard, Court took case under advisement, entered in Civil Order Book 30, page 76.	(34)
Sept. 24	Exhibits filed.	
Sept. 30	Post-Trial Brief for Plaintiff filed. Service by counsel.	
Sept. 30	Joint Brief of Defendants, filed. Copy served by Attorney.	
Oct. 15	Memorandum Opinion of Judge Robert L. Taylor, District Judge, that plaintiff is not entitled to any relief sought in the complaint, filed. Copies mailed to attorneys by Clerk.	(35)
Oct. 15	Original Transcript of Court Reporter Vol. I to IV, filed.	(36)
Oct. 21	Order that the plaintiff take nothing and that the action be dismissed on the merits, and that the defendants recover of the plaintiff their proper costs for which execution may issue, entered in Civil Order Book 30, page 138, and filed: Attested copy mailed TVA by Clerk. Off the Docket	(37)
[fol. 4]		
Oct. 23	Copy of deposition of Ralph B. Miner filed.	
Oct. 31	Motion pursuant to Rule 52 and Memorandum in support thereof, filed. Copies served by Counsel.	(38)
Nov. 2	Motion for injunction pursuant to Rule 62, filed. Copies served by Counsel.	(39)

Docket Entries

Date 1963	Proceedings	Date Order or Judgment Noted
Nov. 5	Injunction and restraining order, pending a ruling of this Court on the plaintiff's Motion to Amend or Set aside Findings and Conclusions, and thereafter during the pendency of any appeal from the final judgment to the U.S. Court of Appeals, the defendants, Edward J. Hardin and James B. DeBusk, Mayors of Tazewell and New Tazewell, Tennessee, and their agents, servants, employees, or any other persons acting in concert with them, are enjoined and restrained from interfering with Kentucky Utilities Company presently existing written or oral customer contracts and services in their respective municipalities, and from removing, disturbing or otherwise interfering with KU's facilities and equipment in such municipalities; that the defendants, Tennessee Valley Authority, its officers, agents, servants, employees and persons acting in concert with it, be and hereby are enjoined and restrained from selling or delivering to the defendant, Powell Valley Electric Cooperative and that Powell Valley, its officers, agents, servants, employees and persons acting in concert with it be, and hereby are enjoined and restrained from purchasing lr receiving from TVA, electric power for re-sale, directly or indirectly, in either of the municipalities of Tazewell or New Tazewell, Tennessee, to persons, firms or corporations in such municipalities who on the date of this order are customers of KU at such customers' locations served by KU on this date, entered in Civil Order Book 30, page 194, and filed. Service of injunction and restraining order acknowledged thereon.	(40)
Nov. 5	Motion to set aside or amend findings or conclusions heard by the Court and taken under advisement, entered in Civil Order Book 30, page 189.	(41)
Nov. 5	Order amending certain findings of fact and conclusions of law contained in the Memorandum Opinion of the Court filed October 15, 1964, entered in Civil Order Book 30, page 197, & filed. (Agreed)	(42)
Nov. 4	Memorandum in Opposition to Plaintiff's Motion for Injunction Pursuant to Rule 62, filed.	
Nov. 12	Original Transcript of Oral Argument at Conclusion of Evidence filed.	(43)
Nov. 23	Clerks Copy of Transcript of Evidence and Proceedings, Vols. 1-4 filed.	
Dec. 31	Notice of Appeal by plaintiff, filed. Copies to Attorneys by Clerk.	(44)
Dec. 31	Bond of Appeal, filed.	(45)
1965		
Jan 21	Order extending time for filing and docketing record on appeal to 90 days from date of filing notice of appeal, entered in Civil Order Book 31 page 139, and filed.	(46)
Mar. 25	Certified record on appeal mailed to Clerk, U.S. Court of Appeals, Cincinnati, Ohio.	

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY, Plaintiff,

vs.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, Individually and as MAYOR OF TAZEWELL, TENNESSEE, and JAMES B. DEBUSK, Individually and as MAYOR OF NEW TAZEWELL, TENNESSEE, Defendants.

COMPLAINT—Filed November 7, 1963

The plaintiff, Kentucky Utilities Company (hereafter called KU), states as follows:

1. KU is a corporation organized and existing under the laws of Kentucky and is qualified and authorized to engage in Tennessee, and is actively engaged in Tennessee, in the transmission, distribution and sale of electric power.

2. The defendant, Tennessee Valley Authority (hereafter called TVA), is a corporation organized and existing under the laws of the United States of America, and specifically under the provisions of Sec. 831 of Title 16 of the United States Code (hereafter called the Code), and is an agency of the United States. Pursuant to Sec. 831c of Title 16 of the Code, TVA may be sued in its corporate name. TVA is doing business in the judicial district of this Court.

3. The defendant, Powell Valley Electric Cooperative (hereafter called Powell Valley), is a rural electric coopera- [fol. 6] tive corporation organized and existing under the laws of Virginia, and is engaged in Tennessee in the distribution and sale of electric power.

4. The defendants, Edward J. Hardin and James B. DeBusk, are citizens and residents of Claiborne County, Tennessee, and are, respectively, Mayor of Tazewell, Ten-

nessee, and Mayor of New Tazewell, Tennessee, said Municipalities being incorporated in Claiborne County, under the General Municipal Corporation Law of Tennessee.

5. This action arises under the Act of August 6, 1959, as amended August 14, 1959, 73 Statute 280, 338 Sec. 831n-4 of Title 16 of the Code, as hereinafter more fully appears; and jurisdiction of this Court is founded upon the provisions of such Section and of Sections 1331, 2201 and 2202 of Title 28 of the Code. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

6. In 1959, as a part of an Act authorizing TVA to issue and sell revenue bonds in an amount not exceeding $750,000,000 to assist in financing its power program, Congress enacted what is now Sec. 831n-4(a) of Title 16 of the Code (hereafter called the 1959 TVA Act). It was represented to Congress that TVA urgently required the authority contained in the said Act to supply the rapidly growing needs for power inside the TVA Area, and it was not contemplated that TVA would, after obtaining passage of the Act, expand its services into areas adequately supplied from other sources. The material provisions of said Act are as follows:

> [fol. 7] "Unless otherwise specifically authorized by Act of Congress the Corporation (TVA) shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a munici-

pality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof * * *."

The area within which TVA is permitted to sell or deliver power, but outside which TVA is prohibited from selling or delivering power, as defined in the foregoing statute, is hereafter referred to as "the TVA Area." The Senate Committee in reporting on the bill which became the TVA Bond Act, with respect to the foregoing cities listed and exempted in the Act, stated:

> [fol. 8] "Passage of the Act would not require these communities to complete their efforts to receive power from TVA. The exemptions save to those communities the right and opportunity they have under existing law and which they were believed to be in the process of exercising."

The Senate Committee report with respect to these listed communities further stated the Bill would:

> "... . protect the rights of *certain* communities to choose their power supply; protect the areas now being served by private utilities . . . .
>
> "It further believes that the TVA Board would use extreme caution in extension of service as authorized and *would not encroach on other communities now served* by private enterprise." (Underscoring supplied).
>
> 1959 U. S. Code Congressional and Administrative News, PP. 2007-8.

7. In enacting the regulatory statute referred to in Paragraph 6, above, it was a primary intent and purpose of Congress to protect the business and properties of investor-owned public utilities serving areas adjacent to the TVA area, including KU—the protection of which interests KU seeks herein—by prohibiting TVA from expanding into and encroaching upon such areas served by investor-owned utilities and appropriating to itself and/or its distributors the electric power business of customers served or suitable for service by such investor-owned utilities. There were additional reasons for the foregoing area limitations in the said Act. As expressed in the Supplemental Views of the Senate Committee attached to the Committee Report on the Bill:

> [fol. 9] "Not only am I concerned lest the Congress should take steps to destroy much of the stability and serviceability of investor-owned power systems which have served their areas and their customers well, but, too, I am deeply troubled by the size of TVA and the powerful bargaining position it has achieved with respect to its purchase of coal, as well as by the manner in which it has used that bargaining power.
>
> "The economy of West Virginia and of contiguous areas is vitally affected by the condition of the bituminous coal industry, which is now in considerable difficulty. Unemployment is high and much distress pre-

vails in the coal producing areas. We heard in the hearings from the miners, the producers, and the sellers of coal as to how TVA has operated to create depressed conditions for bituminous coal on a basis of its buying practices and its subscribing indirectly to inadequate safety standards in coal mines."

1959 U. S. Code Congressional and Administrative News, P. 2019.

Defendants, as hereinafter more fully appears, seek to avoid the limitations imposed upon TVA pursuant to the provisions of the 1959 Act, and thereby to violate the rights conferred by Congress upon the plaintiff.

8. Continuously from 1916 to the date hereof, KU and its former subsidiary, Dixie Power & Light Company, have supplied and KU on July 1, 1957, supplied and now supplies electric service to customers in the incorporated municipalities of Tazewell and New Tazewell, Tennessee. KU's annual revenue from sales of electric power to customers in such two municipalities, at duly established and prevailing rates, are approximately $160,000, and, unless such customers are taken from KU, KU's said annual revenues therefrom will continue to be not less than such sum of $160,000.

[fol. 10] 9. Pursuant to contracts with TVA for the sale or delivery of power, Powell Valley purchases its entire requirements of power from TVA; and Powell Valley resells and distributes only power it has thus obtained by contracts with TVA for the sale or delivery of power.

10. Neither TVA nor its distributor, Powell Valley, was the primary source of power supply on July 1, 1957, within either the municipality of Tazewell, Tennessee, or the municipality of New Tazewell, Tennessee. The area and customers to which Powell Valley now proposes to resell and distribute TVA power are areas and customers in such two municipalities receiving electric service from KU on and after July 1, 1957, and on the effective date of the TVA Act, and are outside the TVA Area.

11. For an extended period of time commencing on a date not now known to KU but shortly after the enactment by Congress of the TVA Act and continuing to the present

time, all of the defendants herein have combined, conspired and agreed to violate in the manners hereafter set forth and other ways the 1959 TVA Act, and, contrary to the intent, purpose and express provisions of such Act, to appropriate to themselves the electric utility business and customers of KU outside the TVA Area and within the municipalities of Tazewell and New Tazewell, Tennessee.

12. The said defendants have encouraged and persuaded elected officials of such two municipalities to either acquire the electric distribution facilities of KU within such mu- [fol. 11] nicipalities, or to construct therein duplicating electric distribution facilities, for the purpose of appropriating to the said defendants the customers and business of KU within such municipalities. Pursuant to the said combination, conspiracy and agreement, defendants TVA and Powell Valley have in writing and otherwise promised to such officials of such municipalities that, if the municipalities acquired or constructed such electric distribution facilities, Powell Valley would sell and deliver to such facilities, and to customers now being served by KU, power which Powell Valley has acquired and will continue to acquire from and pursuant to contract with TVA.

13. Ostensibly, acting under resolutions of the municipalities of Tazewell and New Tazewell, Tennessee, and pursuant to the conspiratorial persuasion and encouragement of defendants, TVA and Powell Valley, the defendants Edward J. Hardin and James B. DeBusk, are interfering with the contracts which plaintiff has with individual customers in said municipalities and are inducing such customers to terminate, breach and sever such contracts. Said acts by these individual defendants are without lawful excuse or justifiable cause because such acts are pursuant to the conspiracy stated above and because the municipal resolutions relied on by said individual defendants violate TCA. Sections 6-204 and 6-206. Also, said resolutions constitute unlawful delegations of legislative powers.

14. On October 30, 1963, contractors engaged by defendants Hardin and DeBusk, commenced actual construction and installation of electric distribution facilities to connect [fol. 12] electric distribution facilities of Powell Valley directly to individual customers heretofore and to the present

time served by KU. Powell Valley has no power which it could supply to any such customer other than power obtained from TVA and pursuant to contract with TVA for the sale or delivery of such power. Such sales and deliveries of such power by Powell Valley to such customers of KU would have the effect of making TVA or its distributor, Powell Valley, directly or indirectly, a source of power supply outside the area for which TVA or its said or any other distributor was the primary source of power supply on July 1, 1957, and would have the effect of making TVA or its said distributor a source of power supply in the said two municipalities which were receiving electric service from another source, to-wit: KU, on and after July 1, 1957, and to specific customers to which electric service was being supplied by KU on such date and on the effective date of the 1959 TVA Act.

15. Unless the defendants are, and each of them is, prevented and enjoined herein from interfering with plaintiff's customer contracts and from selling or delivering TVA power, directly or indirectly, to customers served on October 30, 1963, by KU, KU will lose revenues in the present magnitude of $160,000 annually and will thereby and in other ways suffer irreparable damage for which it has no adequate remedy at law.

16. An actual controversy exists between the plaintiff and the defendants with respect to the legality of the sale and/or delivery of TVA power by Powell Valley to cus- [fol. 13] tomers heretofore and now served by KU within the municipalities of Tazewell and New Tazewell.

Wherefore, the plaintiff, Kentucky Utilities Company, demands judgment permanently enjoining defendants Hardin and DeBusk from interfering with plaintiff's customer contracts and enjoining TVA from selling or delivering to Powell Valley, and permanently enjoining Powell Valley from purchasing or receiving from TVA, electric power for resale, directly or indirectly, in either of the municipalities of Tazewell, Tennessee, or New Tazewell, Tennessee, other than to persons, firms or corporations in such municipalities who on October 30, 1963, were customers of Powell Valley at such customers' locations served by Powell Valley on

such date. The plaintiff further demands all other relief to which it is entitled, including damages and its costs herein expended.

s/ Malcolm Y. Marshall. s/ James S. Welch. Ogden, Robertson & Marshall, 610 Marion E. Taylor Building, Louisville 2, Kentucky. s/ John A. Rowntree. s/ Claude K. Robertson. Fowler, Rowntree & Fowler, 1412 Hamilton Bank Bldg., Knoxville, Tennessee, Counsel for Kentucky Utilities Company.

[fol. 14] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

ANSWER AND COUNTERCLAIM, TAZEWELL AND NEW TAZEWELL—Filed November 21, 1963

Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, for answer to the Complaint heretofore filed by Kentucky Utilities Company (KU), by counsel, state as follows:

I

1. They admit the averments contained in paragraphs numbered 1, 2, 3, 4, and 5 of the Complaint.

2. As to paragraph number 6 of the Complaint, they admit the TVA Act was amended in 1959 to authorize issuance and sale of revenue bonds as stated in the Complaint, but for [fol. 15] lack of information they deny the averments as to representations made to Congress in the amending action. They admit the portion of the amendment of the TVA Act quoted in paragraph 6 of the Complaint as being a part of the aforementioned act. For lack of information they deny the other averments and quotations in paragraph 6.

3. They deny the averments contained in paragraph 7 of the Complaint and except as hereinafter stated, they deny the averments contained in paragraphs numbered 8, 10, 11, 12, 13, 14, and 15 of the Complaint.

4. On information and belief they admit the averments contained in paragraphs numbered 9 and 16 of the Complaint.

Wherefore, Defendants demand that the Complaint of the Plaintiff, Kentucky Utilities Company be dismissed at Plaintiff's cost.

II

Counterclaim

For further answer and counterclaim against the plaintiff, KU, the defendants Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, by counsel, state as follows:

1. They reaffirm the statements, averments and demands hereinabove made.

2. The Town of Tazewell, Tennessee was incorporated as a municipality on November 17, 1954, and the Town of New [fol. 16] Tazewell, Tennessee was incorporated as a municipality on November 19, 1954. Neither town has ever granted franchise to KU, nor does KU or any other utility occupy the city streets and public passways as a holder of a franchise, and though KU has on numerous occasions sought to obtain a franchise from Tazewell and New Tazewell, such efforts have always been declined by Tazewell and New Tazewell.

3. The entire service area herein in controversy, including the entire municipal areas of Tazewell and New Tazewell, are served from a substation owned by Powell Valley Electric Cooperative, defendant herein, and power distributor of TVA, and there are numerous points of service within the municipalities of Tazewell and New Tazewell where electricity is supplied at retail by Powell Valley Cooperative and all the service lines of KU in the area of the defendant cities derive their power and energy from and through the aforesaid substation owned by Powell Valley Electric Cooperative.

4. For many years prior to July 1, 1957, on July 1, 1957, and at all times subsequent thereto, TVA and its distributors were and have been the primary source of power supply in an area which includes the area of the municipalities of Tazewell and New Tazewell.

5. On the 26th day of September, 1963, the mayors of Tazewell and New Tazewell, pursuant to instructions from the city council of each of the aforesaid towns, wrote KU informing it of the determination of the cities either to [fol. 17] acquire or construct electric facilities to serve the residents of the cities and certain fringe areas and offering

to purchase at depreciated cost plus reasonable severance the KU facilities in the area. No response was ever received from KU to the offer contained in the aforesaid letter. On the 30th day of October, 1963, construction was commenced by the cities of Tazewell and New Tazewell to provide power to certain residents who had requested electric service from the municipalities, and subsequent thereto KU was requested to remove certain of its facilities from the area where the aforesaid construction had taken place. No response to this request has been received from KU, and KU has refused by its inaction and apparently now does refuse to remove its facilities as requested and directed by the cities of Tazewell and New Tazewell.

6. The continued presence of the aforesaid facilities of KU inside the cities of Tazewell and New Tazewell is wrongful and without right on the part of KU, and is injurious to the cities and the citizens thereof, and as construction of the municipal systems has progressed and as it may progress in the future, unless the plaintiff is directed by mandatory injunction to remove its facilities from the cities, the city streets and public passways will be cluttered with unnecessary and useless facilities greatly damaging them, which damage will be irreparable and for which the cities have no adequate remedy at law.

[fol. 15] Wherefore, Defendants, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, demand judgment dismissing the Complaint of KU heretofore filed and issuing mandatory injunction against the plaintiff requiring it to remove its facilities from the areas of the cities where municipal facilities have been constructed and to continue to remove said facilities as the construction of the municipal systems progresses. The defendants further demand all other relief to which they are entitled, including costs herein expended.

s/ William R. Stanifer, Tazewell, Tennessee.
s/ Philip P. Ardery, 906 Kentucky Home Life Building, Louisville 2, Kentucky, Attorney for Defendants, Tazewell and New Tazewell.

Certificate of service (omitted in printing.)

[fol. 19] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4961

[Title omitted]

ANSWER OF POWELL VALLEY ELECTRIC COOPERATIVE. Filed November 22, 1963

Powell Valley Electric Cooperative, for answer to the Complaint heretofore filed by Kentucky Utilities Company, by counsel, states:

1. It admits the averments contained in paragraphs numbered 1, 2, 3, 4, 5, 9, and 16 of the Complaint and denies the averments of all other paragraphs of the Complaint, save and except as hereinafter stated.

2. It admits the amendment to the TVA Act by the United States Congress in 1959 as quoted in the Complaint. It states that for a number of years prior to July 1, 1957, on that date and at all times subsequent thereto, TVA and its distributors were and have been the primary source of [fol. 20] power supply in the entire area of Claiborne County, Tennessee, including the area of the cities of Tazewell and New Tazewell, Tennessee. On July 1, 1957 and for several years prior thereto and at all times subsequent thereto, TVA and its distributors have been the chief suppliers of power in the area of Claiborne County, Tennessee from the standpoint of kilowatts of power required for service and from the standpoint of kilowatt hours of energy sold and from the standpoint of the quantity and value of electric facilities installed for the provision of electric service in said area. Kentucky Utilities Company for a number of years prior to July 1, 1957, on that date, and at all times subsequent thereto has not been a primary source of power supply in the aforesaid area, but has been only a minimal secondary source of power supply in said area.

Wherefore, the defendant, Powell Valley Electric Cooperative demands the Complaint herein be dismissed at the cost of the plaintiff, together with other proper relief.

s/ Clyde Y. Cridlin, Attorney for Powell Valley Electric Cooperative, Jonesville, Virginia.

[fol. 21] Certificate of service (omitted in printing.)

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

REPLY TO COUNTERCLAIM—Filed December 12, 1963

The plaintiff, Kentucky Utilities Company (hereafter called KU), for its Reply to the Counterclaim of the defendants, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, states as follows:

First Defense

The Counterclaim fails to state a claim upon which relief can be granted.

Second Defense

1. With respect to Paragraph 2 of the Counterclaim, KU (*a*) admits that the Town of Tazewell, Tennessee was incorporated as a municipality on November 17, 1954, and admits that the Town of New Tazewell, Tennessee was incorporated as a municipality on November 19, 1954, (*b*) admits that neither of such Towns, since its respective said incorporation, has taken formal action to grant a franchise to KU, (*c*) denies that neither KU nor any other utility occupies the city streets and public passways as a holder of a franchise, and affirmatively avers that in both Tazewell and New Tazewell KU occupies the city streets and public passways as holder of a valid and effective franchise, (*d*) [fol. 23] denies that KU has, on numerous occasions or on any occasion, sought to obtain a franchise from Tazewell and New Tazewell or from either of said Towns, (*e*) denies that any such effort has been made by KU or declined by Tazewell or New Tazewell and (*f*) denies all remaining averments in such Paragraph of the Counterclaim.

2. With respect to Paragraph 3 of the Counterclaim, KU admits that the entire service area within the incorporated

municipalities of Tazewell and New Tazewell, as well as certain service area outside such incorporated municipalities, now is normally served through a substation owned by Powell Valley Electric Cooperative, defendant herein and power distributor of TVA. KU affirmatively avers, however, that, both now and on and prior to July 1, 1957, the only transmission lines entering and supplying power to such substation were and are transmission lines which are owned, operated and maintained by, and are under the exclusive control of, KU as a part of KU's electric power transmission system; and all electric power going from or passing through such substation has been and is delivered to such substation over the said transmission lines of KU. KU further avers that, under emergency conditions occurring on the said facilities now normally used in service to the said area, portions of such area have been and can be supplied entirely by distribution lines and other facilities, including a substation, which are owned, operated and maintained by, and are under the exclusive control of, KU. Further with respect to such Paragraph 3, KU (*a*) denies that there are numerous, but admits that there are a few, points of service within the municipalities of Tazewell and New Tazewell where electricity is supplied at retail by Powell Valley Cooperative, (*b*) admits that all the service lines of KU in the area of the defendant cities now normally derive their power and energy through the aforesaid substation owned by Powell Valley Electric Cooperative, but only to the extent and in the manner hereinabove specified, and (*c*) denies all remaining averments in such Paragraph of the Counterclaim.

3. KU denies the averments in Paragraph 4 of the Counterclaim, and specifically denies that TVA or any of its distributors has at any time been the primary source of [fol. 24] power supply in either of the municipalities of Tazewell or New Tazewell.

4. With respect to Paragraph 5 of the Counterclaim, KU admits that on September 26, 1963, the Mayors of Tazewell and New Tazewell wrote a letter to KU substantially as averred in the Counterclaim, but KU is without knowledge or information sufficient to form a belief as to whether such letter was written pursuant to instructions from the City

Council of either said Town. KU denies that no response was ever received from it to the said letter or any offer deemed to be contained therein. Further with respect to such Paragraph 5 of the Counterclaim, KU admits that on October 30, 1963, persons engaged by one or more of the defendants commenced construction of short extensions from electric facilities of Powell Valley Electric Cooperative to extend electric service from such facilities of Powell Valley to customers which immediately prior thereto were the customers of and served by KU from and by means of facilities owned, operated and maintained by KU; but KU is without knowledge or information sufficient to form a belief as to whether any of such construction was commenced by either of the cities of Tazewell or New Tazewell, or whether certain or any residents had requested electric service from either of said cities. The first request of KU that it remove any of its facilities was KU's receipt, on November 6, 1963, of a telegram from the defendants Hardin and DeBusk, which telegram in its entirety (except for address and signatures) is as follows:

> "As you know we have commenced construction of a municipal power system in Tazewell and New Tazewell, Tenn. We would appreciate prompt removal of your duplicated facilities as the construction progresses."

The Complaint herein was filed on November 7, 1963, and is deemed a sufficient response to such telegram; and KU does now refuse to remove any of its facilities within either of the Towns of Tazewell or New Tazewell. KU denies all remaining averments in Paragraph 5 of the Counterclaim.

5. KU denies the averments in Paragraph 6 of the Counterclaim.

6. KU denies all averments in the Counterclaim not hereinabove expressly admitted.

[fol. 25] Third Defense

For further reply to such Counterclaim, KU adopts by reference all averments in its Complaint herein.

Wherefore, the plaintiff, Kentucky Utilities Company, prays as in its Complaint herein, and that the Counterclaim of the defendants, Edward J. Hardin and James B. DeBusk, Individually and as Mayors, respectively, of Tazewell and New Tazewell, Tennessee, be dismissed.

s/ Malcolm Y. Marshall, James S. Welch, Ogden, Robertson & Marshall, 610 Marion E. Taylor Building, Louisville 2, Kentucky. s/ John A. Rowntree, Claude K. Robertson, Fowler, Rowntree & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee. s/ James D. Estep, Jr., Tazewell, Tennessee, Counsel for Plaintiff.

Certificate of service (omitted in printing.)

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

ANSWER OF DEFENDANT TENNESSEE VALLEY AUTHORITY—Filed January 6, 1964

First Defense

Plaintiff lacks standing to maintain this action.

Second Defense

The Court lacks jurisdiction in that the complaint does not present a justiciable controversy.

Third Defense

The complaint fails to state a claim upon which relief can be granted.

Fourth Defense

1. The defendant Tennessee Valley Authority (hereinafter called TVA) is without knowledge or information sufficient to form a belief as to whether plaintiff Kentucky Utilities Company (hereinafter called KU) is qualified and authorized to engage in the transmission, distribution, and sale of electric power in the State of Tennessee. All other allegations of paragraph 1 are admitted.

[fol. 27] 2. The allegations of paragraphs 2 through 4 of the complaint are admitted.

3. The allegations of paragraph 5 are denied.

4. Answering paragraph 6, TVA admits the enactment by the Congress of the Act of August 5, 1959, portions of which are quoted in paragraph 6 and states that the provisions of the Act speak for themselves. TVA further admits that the material quoted in paragraph 6 from the 1959 *U. S. Code and Congressional Administrative News* is a portion of a

committee report of the United States Senate relating to H. R. 3460 as reported. All other allegations in paragraph 6 are denied.

5. Answering paragraph 7, TVA says that the TVA Act speaks for itself. Further answering this paragraph, TVA admits that the materials quoted therein appear in the second Senate committee report on H. R. 3460 as the individual views of Senator Jennings Randolph, a member of the Senate Committee on Public Works. All other allegations of paragraph 7 are denied.

6. Answering paragraph 8, TVA admits that KU, on and before July 1, 1957, supplied and now supplies the electric service of certain customers within the incorporated municipalities of Tazewell and New Tazewell, Tennessee. TVA is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 8.

7. TVA admits the allegations of paragraph 9.

8. Answering paragraph 10, TVA admits that Powell Valley proposes to resell and distribute TVA power to certain electric customers within the incorporated municipalities of Tazewell and New Tazewell, Tennessee, some of whom were receiving electric service from KU on and after July 1, 1957. All other allegations in paragraph 10 are denied. Further answering paragraph 10, TVA states that the municipalities of Tazewell and New Tazewell, Tennessee, and the electric consumers located therein, are within the service area of and the area for which Powell Valley Electric Cooperative, a distributor of TVA power, was the primary source of power supply on July 1, 1957.

[fol. 28] 9. The allegations of paragraphs 11, 12, and 13 are denied.

10. Answering paragraph 14, TVA states that it lacks knowledge or information sufficient to form a belief as to whether on October 30, 1963, contractors engaged by defendants Hardin and DeBusk commenced actual construction and installation of electric distribution facilities to connect the electric distribution facilities of Powell Valley directly to individual customers heretofore and to the present time served by KU. TVA admits that Powell Valley has no electric power which it could supply to any customers other

than power obtained from TVA and pursuant to its contracts with TVA for the sale and delivery of power. The remaining allegations of paragraph 14 are denied.

11. TVA denies the allegations of paragraphs 15 and 16.

12. All allegations of the complaint not specifically admitted are denied.

Wherefore, defendant TVA demands that the action be dismissed as to it and that it recover its proper costs.

s/ Charles J. McCarthy, General Counsel, Tennessee Valley Authority, Knoxville, Tennessee. s/ Thomas A. Pedersen, Assistant General Counsel. s/ Lewis E. Wallace, Attorneys for Defendant, Tennessee Valley Authority.

[fol. 29] Certificate of Service (omitted in printing.)

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

INTERROGATORIES OF DEFENDANT TENNESSEE VALLEY AUTHORITY—Filed April 2, 1964

Defendant Tennessee Valley Authority requests plaintiff Kentucky Utilities Company by its corporate officers or duly authorized agents having knowledge of the facts to answer under oath pursuant to Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. When and how did plaintiff become qualified and authorized to engage in the sale and distribution of electric power in Tennessee, and more especially in Claiborne County, Tennessee?

2. As to the period from June 1957 until the filing of this action, what, if any, authority, permit, or franchise has plaintiff had to sell and distribute electric power within the corporate limits of Tazewell, Tennessee, and as to any such authority, permit, or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
(c) For what period of time it was granted.
(d) Whether it is exclusive or nonexclusive.
(e) Describe any and all conditions or limitations pertaining thereto.

[fol. 31] 3. As to the period from June 1957 until the filing of this action, what, if any, authority, permit, or franchise has plaintiff had to sell and distribute electric power within the corporate limits of New Tazewell, Tennessee, and as to any such authority, permit, or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
(c) For what period of time it was granted.

(d) Whether it is exclusive or nonexclusive.

(e) Describe any and all conditions or limitations pertaining thereto.

4. List the names and addresses of all the electric power customers who were served by plaintiff within the corporate limits of Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

5. List the names and addresses of all the electric power customers who were served by plaintiff within the corporate limits of New Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

6. List the names and addresses of all the electric power customers within Claiborne County, Tennessee, other than the customers listed in answer to interrogatories Nos. 4 and 5 above, who were served by plaintiff:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

[fol. 32] (c) As of the date the complaint was filed (November 7, 1963).

7. State the total number of kilowatt-hours of electricity consumed by plaintiff's electric power customers for each of the months of June 1957, July 1957, August 1959, November 1963, in the following areas:

(a) Claiborne County, Tennessee.

(b) Tazewell, Tennessee, as the corporate limits then existed.

(c) New Tazewell, Tennessee, as the corporate limits then existed.

8. Do you contend that TVA, or its distributors, was not the "primary source of power supply on July 1, 1957," within that portion of Claiborne County, Tennessee, which lies outside of the corporate limits of Tazewell and New Tazewell, Tennessee, and, if so, state the basis for your contention.

9. As to the areas of Tazewell and New Tazewell, Tennessee, which were annexed after July 1, 1957, state the following:

(a) Whether you contend that defendants, or any of them, are prohibited from serving, or continuing to serve, the customers which they were serving at the time of annexation, and, if so, state the basis of such contention.

(b) Whether you contend that defendants, or any of them, are prohibited from serving any new customers in the annexed areas to whom electric service was not being supplied from another source, and, if so, state the basis of such contention.

(c) Whether you contend that defendants, or any of them, are prohibited from serving any of plaintiff's customers in the annexed areas who have requested electric service from the defendants, or any of them, and, if so, state the basis of such contention.

10. Do you contend that the areas and customers within the municipalities of Tazewell and New Tazewell, Tennessee, to which Powell Valley was selling and distributing electric power on or before July 1, 1957, are outside of the "TVA area" as described in paragraph 10 of the complaint; and, if so, state the basis of your contention.

[fol. 33] 11. Do you contend that the areas and customers within the municipalities of Tazewell and New Tazewell, Tennessee, to which Powell Valley was selling and distributing electric power on or before August 6, 1959, (the effective date of the 1959 amendment to the TVA Act), are outside of the "TVA area" as described in pargraph 10 of the complaint; and, if so, state the basis of your contention.

12. Do you contend that the entire boundary of a tract of

land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the "TVA area" as described in paragraph 10 of your complaint?

13. If your answer to interrogatory 12 is in the affirmative, do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Electric Cooperative, is within the "TVA service area" as defined in your complaint?

14. As to the allegations in paragraph 11 of the complaint that "all of the defendants herein have combined, conspired and agreed to violate . . . the 1959 TVA Act," state the following:

(a) Describe in detail each act or thing done by the defendants which you contend constituted the alleged acts, stating as to each the date and the place the act or thing was done, the name of the person or persons involved and upon whose behalf each person was acting, and the names and addresses of all persons known to you who have knowledge of such matters.

(b) List and describe every document used by you in answering this interrogatory which you contend support the foregoing allegations, together with the name and address of the custodian thereof.

15. With respect to the allegations in paragraph 12 of the complaint that "the said defendants have encouraged and persuaded elected officials of such two municipalities to either acquire the electric distribution facilities of KU within such municipalities, or to construct therein duplicating electric distribution facilities, for the purpose of appropriating to the said defendants the customers and [fol. 34] business of KU within such municipalities," state the following:

(a) The facts upon which you now rely and reasonably anticipate you will rely at the trial in support of such allegations.

(b) List and describe every document used by you in answering this interrogatory which you contend supports

the statements contained in your answer hereto, together with the name and address of the custodian thereof.

(c) Give the names and addresses of all persons known to you who have personal knowledge of the matters alleged.

16. With respect to the allegations in paragraph 13 of the complaint that the defendants "are interfering with the contracts which plaintiff has with indiivdual customers in said municipalities and are inducing such customers to terminate, breach and sever such contracts," state the following:

(a) List and describe each contract which plaintiff contends it has with individual customers in the municipalities, giving as to each the name and address of the individual with whom such contract was entered into and the date thereof, whether the contract is oral or written, and identify each customer which plaintiff contends has been induced by the defendants to terminate, breach and sever his contract.

(b) Describe in detail each act or thing done by the defendants which you contend constituted such acts of interference with such contracts or which induced the breach thereof, giving the name of the person or persons who performed such act and the date and place such act was performed.

(c) State the names and addresses of all persons known to you who have knowledge of the matters referred to in this interrogatory.

(d) State the name and address of the custodian of each of the contracts referred to in answer to this interrogatory.

17. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical facilities located in Claiborne County, Tennessee, used exclusively in connection with the sale and distribution of electricity to its customers in Claiborne County, Tennessee:

(a) As of July 1, 1957.

[fol. 35] (b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

18. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical fa-

cilities located within the corporate limits of Tazewell, Tennessee, as such corporate limits existed on the dates indicated, used exclusively in connection with the sale and distribution of electricity to its customers in Tazewell, Tennessee:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

19. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical facilities located within the corporate limits of New Tazewell, Tennessee, as such corporate limits existed on the dates indicated, used exclusively in connection with the sale and distribution of electricity to its customers in New Tazewell, Tennessee:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

20. List and describe by date and other indicia sufficient for the complete identification thereof all maps, charts, drawings, or other documents which would show or indicate the location of electric customers of plaintiff within Claiborne County, Tennessee, as of July 1, 1957, August 6, 1959, and November 7, 1963. In the event that the plaintiff does not have documents which would furnish the information requested as of the dates indicated, give the requested information as of such date nearest thereto for which the [fol. 36] information is available, and as to each document give the name and address of the present custodian thereof.

21. List and describe all maps which were furnished by you to any Committee of Congress, or any member of Congress, in connection with the hearings which were held with respect to any of the bills leading up to the 1959 amendment to the TVA Act, and as to each give the name of the Committee, or member of Congress, to whom it was supplied, the date it was supplied, and the name and address of the

custodian, or in the alternative, attach a copy of the map to your answer.

22. State the highest total hourly kilowatt demand by plaintiff's customers during each of the months of June 1957, July 1957, August 1959, and November 1963, in each of the following areas:

(a) Claiborne County, Tennessee.

(b) Tazewell, Tennessee, as the corporate limits then existed.

(c) New Tazewell, Tennessee, as the corporate limits then existed.

In the event that plaintiff does not have records which would furnish the information requested on an hourly basis, give the requested information for such period of demand nearest thereto for which the information is available.

23. State the name, address, and present title of all witnesses whose testimony plaintiff reasonably anticipates it will introduce in the trial of this cause and as to each witness, state in summary form the substance of his proposed testimony.

24. List and describe every document, including correspondence, maps, charts, photographs, etc., which you now reasonably anticipate that you may rely upon in any manner at the trial of this cause, and state the name and address of the person who has custody of each document.

Within fifteen (15) days from the service of the foregoing interrogatories, defendant is required by Rule 33 of the Federal Rules of Civil Procedure to serve answers upon the Tennessee Valley Authority, and it is requested that such [fols. 37-38] answers be served upon Charles J. McCarthy, General Counsel, Tennessee Valley Authority, Knoxville, Tennessee.

This 1st day of April 1964.

s/ Charles J. McCarthy, General Counsel, Tennessee Valley Authority, Knoxville, Tennessee. s/ Thomas A. Pedersen, Assistant General Counsel. s/ Lewis E. Wallace, Attorneys for Tennessee Valley Authority.

Certificate of service (omitted in printing).

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

ANSWERS OF KENTUCKY UTILITIES COMPANY TO INTERROGATORIES SERVED BY TENNESSEE VALLEY AUTHORITY ON APRIL 1, 1964—Filed May 2, 1964.

[fol. 40] Reserving all objections on grounds of relevancy, materiality or competency, the plaintiff, Kentucky Utilities Company (KU), by its President, William A. Duncan, hereby answers those Interrogatories served upon it by the defendant, Tennessee Valley Authority (TVA), on April 1, 1964, except those of such Interrogatories numbered 23 and 24 to which written objection has heretofore been made:
Interrogatories Nos. 1, 2 and 3:

1. When and how did plaintiff become qualified and authorized to engage in the sale and distribution of electric power in Tennessee, and more especially in Claiborne County, Tennessee?
2. As to the period from June 1957 until the filing of this action, what, if any, authority, permit, or franchise has plaintiff had to sell and distribute electric power within the corporate limits of Tazewell, Tennessee, and as to any such authority, permit, or franchise, state the following:

   (a) When it was granted.
   (b) By whom it was granted.
   (c) For what period of time it was granted.
   (d) Whether it is exclusive of nonexclusive.
   (e) Describe any and all conditions or limitations pertaining thereto.

3. As to the period from June 1957 until the filing of this action, what, if any, authority, permit or franchise has plaintiff had to sell and distribute electric power within the corporate limits of New Tazewell, Tennessee, and as to any such authority, permit, or franchise, state the following:

[fol. 41] (a) When it was granted.

(b) By whom it was granted.

(c) For what period of time it was granted.

(d) Whether it is exclusive of nonexclusive.

(e) Describe any and all conditions or limitations pertaining thereto.

Answer to Nos. 1, 2 and 3:

KU has in its possession a certified copy of the Certificate of the Secretary of State of Tennessee of the qualification of KU under the Foreign Corporation Law of Tennessee, such Certificate being dated November 14, 1919. Such qualification is still fully effective.

On May 11, 1914, the Town Council of Cumberland Gap, Tennessee, granted to W. H. Squires, his successors and assigns, a Franchise, for a period of 99 years, to construct, maintain and operate in Cumberland Gap a system for the generation, purchase, distribution, transmission and sale of electrical energy. On June 29, 1914, such Franchise and all rights and privileges thereunder were assigned and transferred by W. H. Squires to Tennessee Public Service Company. On September 25, 1919, such Franchise and all rights and privileges thereunder were assigned and transferred by Tennessee Public Service Company to KU, and from such date to the present time KU has owned and operated under, and now owns and operates under such Franchise.

On April 5, 1926, the Quarterly County Court of Claiborne County, Tennessee, granted to Dixie Power & Light Company, its successors or assigns, a Franchise to construct and maintain power and light lines along any of the public highways of Claiborne County. A photostatic copy of a certified copy of the Minutes of the Quarterly County Court, as recorded in Minute Book J, Page 567, of the records of such

Court, is attached as Exhibit 1. At the time such Franchise was granted to Dixie Power & Light Company, such Company was a wholly-owned subsidiary of KU.

On October 15, 1926, in Docket No. 1178, the Railroad & Public Utilities Commission of Tennessee, on joint application of the Quarterly County Court of Claiborne County and Dixie Power & Light Company, entered an Order approving [fol. 42] the grant of such Franchise to Dixie Power & Light Company. A photostatic copy of a certified copy of such Order is attached as Exhibit 2.

On July 7, 1952, the Quarterly County Court of Claiborne County granted to KU a Franchise to construct and perpetually operate and maintain electric transmission and distribution lines over, along and across County highways between Cumberland Gap and New Tazewell. A photostatic copy of a certified copy of the Minutes of such Court granting the Franchise, as recorded in Minute Book Q, Page 63, of the records of such Court, is attached as Exhibit 3.

In 1954, Dixie Power & Light Company was dissolved and in connection with such dissolution transferred and conveyed to KU, its successors and assigns, all of Dixie Power & Light Company's assets and properties, including the said 1926 Franchise from the Quarterly County Court of Claiborne County. Such transfer was approved by the Tennessee Railroad & Public Utilities Commission. A photostatic copy of a certified copy of the Order of the Commission, in Docket No. U-3484, dated May 25, 1954, approving the acquisition by KU of the said Franchise and the operation by KU of the electric properties in the territory covered by such Franchise, is attached as Exhibit 4. A photostatic copy of a certified copy of the Instrument of Conveyance and Bill of Sale, dated July 31, 1954, by which Dixie Power & Light Company transferred and conveyed to KU, among other properties, the said Franchise, as such Instrument of Conveyance is recorded in Book of Deeds 13, Page 173-4, in the office of the Register of Deeds of Claiborne County, Tennessee, is attached as Exhibit 5.

Both the 1926 Franchise originally granted to Dixie Power & Light Company and the 1952 Franchise to KU are perpetual, non-exclusive franchises, and each is still in full force and effect.

Interrogatory No. 4:

4. List the names and addresses of all the electric power customers who were served by plaintiff within the corporate limits of Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

[fol. 43] (a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

Answer:

The names and addresses of the electric power customers of KU within the corporate limits of Tazewell, Tennessee, on the said dates as the corporate limits existed on those dates are, respectively, contained in attached Exhibits 6, 7 and 8. KU does not have street addresses for these customers.

Interrogatory No. 5:

5. List the names and addresses of all the electric power customers who were served by plaintiff within the corporate limits of New Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

Answer:

The names and addresses of the electric power customers of KU within the corporate limits of New Tazewell, Tennessee, on the said dates as the corporate limits existed on those dates are, respectively, contained in attached Exhibits 9, 10 and 11. KU does not have street addresses for these customers.

Interrogatory No. 6:

6. List the names and addresses of all the electric power customers within Clairborne County, Tennessee, other than the customers listed in answer to interrogatories Nos. 4 and 5 above, who were served by plaintiff:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

Answer:

Expressly denying the relevancy or materiality of the information requested in Interrogatory No. 6, KU states that the names and addresses of electric power customers of KU within Claiborne County, Tennessee, other than the [fol. 44] customers listed in the Answers to Interrogatories Nos. 4 and 5, on the said dates are, respectively, contained in Exhibits 12, 13 and 14.

Interrogatory No. 7:

7. State the total number of kilowatt-hours of electricity consumed by plaintiff's electric power customers for each of the months of June 1957, July 1957, August 1959, November 1963, in the following areas:

(a) Claiborne County, Tennessee.

(b) Tazewell, Tennessee, as the corporate limits then existed.

(c) New Tazewell, Tennessee, as the corporate limits then existed.

Answer:

Expressly denying the relevancy or materiality of some of the information requested in Interrogatory No. 7, KU states that the kilowatt hours of electricity consumed by its electric power customers for the said months in the said areas were as follows:

	Claiborne County	Tazewell	New Tazewell
June 1957	626,043	118,737	116,645
July 1957	588,134	106,647	121,440
August 1959	769,018	148,832	177,985
November 1963	1,080,444	267,448	236,531

Interrogatory No. 8:

8. Do you contend that TVA, or its distributors, was not the "primary source of power supply on July 1, 1957," within that portion of Claiborne County, Tennessee, which lies outside of the corporate limits of Tazewell and New Tazewell, Tennessee, and, if so, state the basis for your contention.

Answer:

KU has not in this action made such contention.

Interrogatory No. 9:

9. As to the areas of Tazewell and New Tazewell, Tennessee, which were annexed after July 1, 1957, state the following:

(a) Whether you contend that defendants, or any of them, are prohibited from serving, or continuing to [fol. 45] serve, the customers which they were serving at the time of annexation, and, if so, state the basis of such contention.

(b) Whether you contend that defendants, or any of them, are prohibited from serving any new customers in the annexed areas to whom electric service was not being supplied from another source, and, if so, state the basis of such contention.

(c) Whether you contend that defendants, or any of them, are prohibited from serving any of plaintiff's customers in the annexed areas who have requested electric service from the defendants, or any of them, and, if so, state the basis of such contention.

Answer:

(a) KU has not in this action made the contention set forth in subparagraph (a).

(b) Yes. The basis for such contention is the provisions

in the 1959 TVA Act (*i*) that TVA shall make no contract for the sale or delivery of power which would have the effect of making TVA or its distributors, directly or indirectly, a source of power supply outside the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and certain "additional area" defined in the Act and (*ii*) that no part of such additional area may be in a municipality receiving electric service from another source on or after July 1, 1957.

(c) Yes. The basis for such contention is that set forth in the Answer to subparagraph (b), above.

Interrogatory No. 10:

10. Do you contend that the areas and customers within the municipalities of Tazewell and New Tazewell, Tennessee, to which Powell Valley was selling and distributing electric power on or before July 1, 1957, are outside of the "TVA area" as described in paragraph 10 of the complaint; and, if so, state the basis of your contention.

Answer:

KU does not in this action contend that the customers within the municipalities of Tazewell and New Tazewell [fol. 46] to which Powell Valley was selling and distributing electric power on July 1, 1957, are outside the "TVA Area" as described in Paragraph 10 of the Complaint. KU does contend that, except for customers to which Powell Valley was selling and distributing electric power on July 1, 1957, all other customers within the municipalities of Tazewell and New Tazewell are outside the "TVA Area" as so described. The basis of such contention is the statutory provisions referred to in the Answers to 9(b) and 9(c), above.

Interrogatory No. 11.

11. Do you contend that the areas and customers within the municipalities of Tazewell and New Tazewell, Tennessee, to which Powell Valley was selling and distributing electric power on or before August 6, 1959, (the effective date of the 1959 amendment to the TVA

Act), are outside of the "TVA area" as described in paragraph 10 of the complaint; and, if so, state the basis of your contention.

Answer:

Under the language of the 1959 TVA Act, the effective date of the Act, August 6, 1959, is not made a material consideration. KU has not in this action sought, however, to require Powell Valley to give up customers to which it was selling and distributing electric power on such date.

Interrogatory No. 12:

12. Do you contend that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the "TVA area" as described in paragraph 10 of your complaint?

Answer:

Yes.

Interrogatory No. 13:

13. If your answer to interrogatory 12 is in the affirmative, [fol. 47] do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Electric Cooperative, is within the "TVA service area" as defined in your complaint?

Answer:

No.

Interrogatories Nos. 14 and 15:

14. As to the allegations in paragraph 11 of the complaint that "all of the defendants herein have combined, conspired and agreed to violate . . . the 1959 TVA Act," state the following:

(a) Describe in detail each act or thing done by the defendants which you contend constituted the alleged acts, stating as to each the date and the place the act or thing was done, the name of the person or persons involved and upon whose behalf each person was acting, and the names and addresses of all persons known to you who have knowledge of such matters.

(b) List and describe every document used by you in answering this interrogatory which you contend support the foregoing allegations, together with the name and address of the custodian thereof.

15. With respect to the allegations in paragraph 12 of the complaint that "the said defendants have encouraged and persuaded elected officials of such two municipalities to either acquire the electric distribution facilities of KU within such municipalities, or to construct therein duplicating electric distribution facilities, for the purpose of appropriating to the said defendants the customers and business of KU within such municipalities," state the following:

(a) The facts upon which you now rely and reasonably anticipate you will rely at the trial in support of such allegations.

(b) List and describe every document used by you in answering this interrogatory which you contend supports the statements contained in your answer hereto, together with the name and address of the custodian thereof.

(c) Give the names and addresses of all persons known to you who have personal knowledge of the matters alleged.

Answer to Nos. 14 and 15:

At a meeting of the Chamber of Commerce of Claiborne County, Tennessee, held on July 10, 1961, the president of the Chamber of Commerce, J. M. Campbell, appointed a Power Committee to investigate the possibility of obtaining "cheaper" electric power service in Claiborne County. The Committee consisted of: Curtis Hopson, Mayor of Cumber-

land Gap, Tennessee; Joe Frank Essary, Mayor of Tazewell, Tennessee; James B. DeBusk, Mayor of New Tazewell, [fol. 48] Tennessee; Frank Tyree, Harrogate, Tennessee; Rome Cardwell, Tazewell; and Reed Bailey, New Tazewell. The Power Committee then arranged for a meeting between representatives of the Claiborne County Chamber of Commerce and officials of TVA in Knoxville, Tennessee. This meeting was held in the latter part of July or the early part of August, 1961. Among the persons present at the meeting representing the Chamber of Commerce were Reed Bailey, William R. Stanifer, Paris Coffey, and James B. DeBusk.

As a result of the meeting in Knoxville a second meeting was held at Cedar Grove, Claiborne County, Tennessee, in the spring of 1962. Arrangements for this meeting were made by Francis E. Berry, Manager of Powell Valley, at the request of William R. Stanifer. Among those attending this meeting were Francis E. Berry, Manager of Powell Valley, Ralph Miner and Harry Rowe, employees of Powell Valley, most of the members of the town councils of Tazewell and New Tazewell, J. M. Campbell, New Tazewell, and Paris Coffey and William R. Stanifer, Tazewell. TVA was represented at the meeting by C. Wilson House, certain TVA lawyers whose names are not known to KU, and possibly a TVA public relations official. At this meeting the TVA attorneys stated that there were legal reasons which might keep TVA from supplying power to Tazewell and New Tazewell but suggested that TVA power might be made available if the towns proceeded in a certain manner.

Walt Carpenter, Field Engineer with the Rural Electrification Administration in Washington, D.C., came to the area to inspect construction work of Powell Valley. During the course of his inspection, he discussed with Powell Valley personnel the matter of Powell Valley's serving KU customers. Carpenter said that if Tazewell and New Tazewell could show that public sentiment was in favor of Powell Valley service and there was enough difference in rates, [fol. 49] Powell Valley might be able to obtain a loan for the project. Among those present during this conversation was Harry Rowe, who was an employee of Powell Valley at that time.

A joint meeting of the town councils of Tazewell and New

Tazewell was held on February 18, 1963. A newspaper account of this meeting is contained in the February 21, 1963 issue of the Claiborne Progress. According to the newspaper account, Ralph Miner, Manager of Powell Valley, addressed the councils and stated that Powell Valley could serve the power requirements of the two towns if the towns acquired or constructed their own distribution system. Miner further suggested that the towns make inquiry to the Tennessee Public Utilities Commission concerning the rates of KU. On the following night, February 19, 1963, another joint meeting of the town councils of Tazewell and New Tazewell was held. Among those present at this meeting was Willis Smith, Manager of KU's District Office at Middlesboro, Kentucky. At this joint meeting, each of the councils adopted a resolution requesting KU to join with the respective towns in filing a joint petition to the Tennessee Public Utilities Commission for a reduction in KU's rates in the area.

According to a newspaper account in the May 11, 1963 issue of the Middlesboro Daily News, James B. DeBusk, Mayor of New Tazewell, stated that a recent statement made by Paris Coffey that the Rural Electrification Administration would liquidate bonds sold by the towns for the purpose of a new system was an error. DeBusk said that any bonds sold would be liquidated out of revenues of the system. The same newspaper reported Ralph Miner, Manager of Powell Valley, as stating that arrangements had been made for operation of the system and that revenues derived from the system would liquidate the bonds. At a regular meeting of the town council of Tazewell held on May 14, 1963, Clarence Presnell, New Tazewell, Tennessee, an employee of KU, asked the council who would be re- [fol. 50] sponsible for such revenue bonds if the system failed and what means would be used to make up the $18,000 to $20,000 in taxes that KU paid. Joe Frank Essary, former mayor of Tazewell, replied that the City had an "iron clad" agreement under which the City would be relieved of all worries if the system failed and that whatever company acquired the facilities it would still have the same assessment. At a meeting of the town council of New Tazewell on March 12, 1963, Paris Coffey, President of the Claiborne County Chamber of Commerce, told the council that TVA

had advised that the town could get cheaper power. He further stated that the City would have to sell bonds but that as soon as the system was taken over by Powell Valley, it would assume payment.

On September 26, 1963, James B. DeBusk, Mayor, New Tazewell, and E. J. Hardin, Mayor, Tazewell, wrote to Floyd I. Fairman, then President of KU, enclosing a copy of their letter of September 11, 1963, to Ralph Miner, Manager, Powell Valley, requesting Powell Valley to provide electric service to the two towns, and a copy of a letter of September 24, 1963, from Miner to Hardin and DeBusk advising that Powell Valley would provide electric service to the two towns. DeBusk and Hardin advised Fairman that Tazewell and New Tazewell expected in the immediate future to either acquire the existing facilities of KU in the area or construct their own system.

On October 30, 1963, employees of Irby Construction Company of Jackson, Mississippi, which company customarily performed construction work for Powell Valley, began connecting existing KU customers to the nearest points in the distribution system of Powell Valley. In the course of such work, the same contractors intermittently performed other work for Powell Valley in the immediate area. On numerous occasions while such work was in progress, between October 30 and November 7, 1963, Powell Valley employees were present and apparently supervising the work of connecting KU customers to the distribution system of Powell Valley.

[fol. 51] On October 31, 1963, Milton H. Lewis, Assistant Division Manager, KU, Pineville, Kentucky, and Willis A. Smith, Manager of KU's Middlesboro, Kentucky, District Office, met with William Stanifer, City Attorney, New Tazewell, in Stanifer's office. They discussed possible losses to KU and to the towns of Tazewell and New Tazewell which might result from the appropriation of KU customers by the towns. Stanifer stated that the matter of costs had been "taken care of" and that the towns were not worried about losing any money. Stanifer refused to divulge the source of funds used to pay the cost of labor and materials in connecting KU customers to the distribution system of Powell Valley. It was also reported in the November 8, 1963 issue of the Middlesboro Daily News that Stanifer re-

fused to divulge the source of funds so used by the City. According to an article in the January 15, 1964 issue of the Middlesboro Daily News, Stanifer also refused to identify the construction firm or engineer who performed the work for the so-called "municipal electric systems" of Tazewell and New Tazewell.

On January 16, 1964, the date of the most recent appropriation of a KU customer by the town of Tazewell, a Powell Valley crew, using Powell Valley equipment, performed the work of connecting such customer with the distribution lines of Powell Valley. The one pole that was installed by this crew to effect such connection was marked TA-4, indicating ownership by the City of Tazewell. In some instances where former KU customers discontinued service from KU and commenced taking service from the so-called "municipal electric systems" of Tazewell and New Tazewell, the meters installed by the Cities were marked "REA PV Coop."

Certain funds were deposited in the Powell Valley National Bank, Jonesville, Virginia, the location of the principal office of Powell Valley, to the credit of the Cities of Tazewell and New Tazewell and such funds were thereafter [fol. 52] disbursed by the Cities in payment for materials, construction work, and attorneys' fees in connection with the construction of the so-called "municipal electric systems" of Tazewell and New Tazewell.

On March 24, 1964, Earl Sandefur, Field Manager of Powell Valley in the Tazewell area, told Clarence Pressnell and Jack Cook, employees of KU, that the customers of KU which had been appropriated by the municipalities of Tazewell and New Tazewell were being billed out of Jonesville, Virginia, like Powell Valley customers, except that they were billed for the account of the respective towns of Tazewell and New Tazewell.

On October 29, 1963, F. I. Fairman, then President of KU, wrote Aubrey J. Wagner, Chairman of the Board of TVA, advising him that the municipalities of Tazewell and New Tazewell were considering acquiring or constructing electric distribution facilities for the announced purpose of obtaining TVA power through Powell Valley, and requesting TVA to advise KU of its position with respect to the availability of TVA power to customers of KU in the towns. By letter

dated November 8, 1963, Wagner replied to the aforementioned letter of Fairman, confirming advice previously given in a telephone conversation of November 1, 1963, that TVA knew of no legal reason why it could not supply power to Powell Valley to be used in serving customers of any distribution systems which the towns constructed.

The names and addresses of persons now known to KU who have knowledge of the foregoing matters are listed in attached Exhibit 15.

The documents used in answering these Interrogatories Nos. 14 and 15 and the names and addresses of the custodians thereof are as follows:

(*1*) Affidavit of J. M. Campbell dated November 13, 1963;

(*2*) Affidavit of Harry Rowe dated November 11, 1963;

[fol. 53] (*3*) Article entitled "Tazewells Ask K.U. Reduction Rate," the Claiborne Progress, February 21, 1963;

(*4*) Letter of February 27, 1963, from L. C. Ault, Recorder, New Tazewell, to KU, W. A. Smith and Public Utilities Commission of Tennessee;

(*5*) Copy of Town of New Tazewell Resolution No. 8 of February 19, 1963;

(*6*) Copy of Town of Tazewell Resolution No. 13 of February 19, 1963;

(*7*) Article entitled "System Revenue to Repay Bonds," Middlesboro Daily News, Saturday, May 11, 1963;

(*8*) Article entitled "Tazewell Seeking Joint Power Meeting," Middlesboro Daily News, March 14, 1963;

(*9*) Log of events in Tazewell and New Tazewell covering the period October 30, 1963, through January 16, 1964;

(*10*) Article entitled "Tazewell Tax Base Said Same," Middlesboro Daily News, May 15, 1963;

(*11*) Eight photographs showing some of the service lines installed by Tazewell and New Tazewell at the premises of customers previously served by KU;

(*12*) The Middlesboro Daily News, issues of November 8, 1963, and January 15, 1964;

(*13*) Copy of letter of March 26, 1963, from F. I. Fair-

man, President, KU, to William DeBusk, Mayor of New Tazewell;

(*14*) Letter of September 26, 1963, from James B. DeBusk and E. J. Hardin, III to Floyd I. Fairman, President, KU;

(*15*) Copy of letter of September 11, 1963, from E. J. Hardin, III, and James B. DeBusk to Ralph B. Miner, Manager, Powell Valley;

(*16*) Copy of letter of September 24, 1963, from Ralph B. Miner to E. J. Hardin, III and James B. DeBusk.

(*17*) Copy of letter of October 29, 1963, from F. I. Fairman to James B. DeBusk, Mayor, New Tazewell;

(*18*) Copy of letter of October 29, 1963, from F. I. Fairman to Edward J. Hardin, III, Mayor, Tazewell;

(*19*) Copy of letter of October 29, 1963, from F. I. Fairman to Aubrey J. Wagner, Chairman of the Board, TVA;

(*20*) Letter of November 8, 1963, from Aubrey J. Wagner to F. I. Fairman, President, KU.

[fol. 54] The documents listed as items 1 through 12 above are in the custody of Milton H. Lewis, Assistant Division Manager, KU, Pineville, Kentucky. The documents listed as items 13 through 20 are in the custody of William A. Duncan, President, KU, 120 South Limestone Street, Lexington, Kentucky.

Interrogatory No. 16:

16. With respect to the allegations in paragraph 13 of the complaint that the defendants "are interfering with the contracts which plaintiff has with individual customers in said municipalities and are inducing such customers to terminate, breach and sever such contracts," state the following:

(a) List and describe each contract which plaintiff contends it has with individual customers in the municipalities, giving as to each the name and address of the individual with whom such contract was entered into and the date thereof, whether the contract is oral or written, and identify each customer which plaintiff contends has been induced by the defendants to terminate, breach and sever his contract.

(b) Describe in detail each act or thing done by the defendants which you contend constituted such acts of interference with such contracts or which induced the breach thereof, giving the name of the person or persons who performed such act and the date and place such act was performed.

(c) State the names and addresses of all persons known to you who have knowledge of the matters referred to in this interrogatory.

(d) State the name and address of the custodian of each of the contracts referred to in answer to this interrogatory.

Answer:

(a) KU has the following written Contracts for Electric Service with customers in Tazewell and New Tazewell, the date of the particular Contract being as indicated:

Tazewell:

Customer's Name	Contract Date
Brooks Furniture Mfg. Co.	2-15-57
R. K. Bunch	2- 1-63
City of Tazewell, Tenn.	11- 8-55
Claiborne County Dept. of Public Health	1-19-59
Claiborne County Hospital	11-12-58
Charles England & Son	12- 9-60
Dayton Shockley	9-28-62
United States Post Office	12-15-61

[fol. 55] New Tazewell:

B & B Super Market	2-18-54
Ball's Super Value	2- 4-55
George Baltrip	9-16-60
Claiborne County Utility Dist.	2-18-47
Claiborne Telephone Company	5- 4-62
Arvil Cole (Barber Shop)	10- 3-62
Coolage Whitaker Feed Mill	12-20-57
Cunningham Drug Co.	3-20-59
Donlin Sportswear, Inc.	7- 8-55
G & F Super Market	1- 7-54
Ray Jennings	1-26-62
McNeil Funeral Home	9-16-60
New Tazewell Jeweler	10-22-62
Overton's Beauty Shop	10- 3-62
Parks-Belk Company	7- 1-57
Reece Monument Company	10-10-59
Town of New Tazewell, Tenn.	7- 5-45
Carson Venable	4- 5-56
Kenneth Western	9-11-61

Each of such Contracts is on KU's Form ES-2, a copy of which is attached as Exhibit 16. KU has no street address for such customers.

Of the foregoing customers with written contracts, the following have been, on the dates indicated, induced by the defendants to terminate, breach and sever such Contracts: Brooks Furniture Mfg. Co., on October 31, 1963; Dayton Shockley residence, on November 1, 1963; and Kenneth Western residence, on November 2, 1963.

In addition to such written Contracts, KU has oral contracts for service with all of its customers in Tazewell and New Tazewell. KU's customers in the two municipalities are listed in the Anwers to Interrogatories 4 and 5.

In addition to having induced the breach of the written Contracts of KU referred to above, the defendants have induced and brought about the breach of KU's oral contracts for service with the following customers of KU within these municipalities:

[fol. 56]

Tazewell	Date of Contract	Date Customer Appropriated
Cope's 66 Service Center	6-15-62	1-17-64
Cecil Hurst residence	4-12-58	10-31-63
Henry McAfee residence	1-26-63	11- 7-63
Mrs. Fred McMurray barn		11- 7-63
Mrs. Fred McMurray residence		11- 7-63
Clarence Mullins residence	6-10-55	11- 7-63
Skyvue Restaurant		10-31-63
T Craft Marine Supply		10-31-63
New Tazewell		
Darrell Campbell residence	10- 7-55	11- 2-63
Dana Day residence	8-21-50	11- 2-63
Mossie Keck residence	12-28-61	11- 2-63
Hobart Minton residence	3- 3-54	11- 7-63
Clarence F. Overton residence	10-22-48	11- 7-63
Lloyd Ramsey residence		11- 2-63
Charles Venable residence	5-13-46	11- 2-63
VFW Club	10-20-48	11- 7-63

(b) At a joint meeting of the Councils of Tazewell and New Tazewell, held on April 30, 1963, a resolution was adopted by each of such Councils authorizing a referendum to be held in the two towns on the question of whether the towns should acquire the existing electric distribution system of KU in the towns. At a meeting of the Town Council of New Tazewell, held on May 14, 1963, a resolution was adopted by the Council rescinding the previous resolution

regarding a public referendum, and a new resolution was adopted authorizing the Mayor to cause a petition to be drawn up by an attorney and circulated in the town on the question of the acquisition of the distribution system of KU or the construction of a duplicating distribution system by the town. A similar resolution was adopted at a meeting of the Town Council of Tazewell, held on May 14, 1963, and in addition, the Mayor of Tazewell was authorized by the Council to hire some competent person to circulate the petition.

Thereafter, pursuant to such resolutions, petitions were circulated in each of the towns and the actions of the Town Councils of Tazewell and New Tazewell regarding the refer- [fol. 57] endum and the petitions received widespread newspaper publicity in the area. Some of the persons employed to circulate the petitions were paid on the basis of 20¢ for each signature obtained.

Subsequent to the circulation of the petitions, the Town Councils of Tazewell and New Tazewell adopted resolutions authorizing the Mayors of the two towns to take the necessary steps to construct duplicating distribution facilities in the two towns. Thereafter, in scattered areas of Tazewell and New Tazewell, facilities were constructed to connect existing customers of KU to the distribution system of Powell Valley. At this time, existing customers of KU in the towns were personally contacted by representatives of the two towns and asked to sign service applications requesting electric service from the two towns. These personal contacts were made primarily by the Mayors of the towns, members of the Town Councils and William Stanifer. KU is informed and believes that among its existing customers so contacted were customers outside the corporate limits of the two towns. The service applications presented to existing customers of KU contained a residential rate schedule based upon existing rates of Powell Valley.

As a result of the above-mentioned activities of officials and employees of the towns of Tazewell and New Tazewell, 18 customers who were receiving electric service from KU on October 30, 1963, have subsequently terminated such service and are now receiving TVA electric power distributed by Powell Valley through its own facilities and facilities constructed by the towns.

(c) The names and addresses of persons now known to KU who have knowledge of the foregoing matters are the persons listed in the Answer to Interrogatories Nos. 14 and 15 and the persons listed in attached Exhibit 17.

(d) The name and address of the custodian of each of the contracts referred to in the Answer to this Interrogatory is Mrs. Elizabeth Chadwell, KU, New Tazewell.

[fol. 58] Interrogatory No. 17:

17. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical facilities located in Claiborne County, Tennessee, used exclusively in connection with the sale and distribution of electricity to its customers in Claiborne County, Tennessee:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

Answer:

Expressly denying the relevancy or materiality of the information requested in Interrogatory No. 17, KU answers such Interrogatory as follows:

As of July 1, 1957	$457,947.93
As of August 6, 1959	$464,992.24
As of November 7, 1963	$591,647.96.

The foregoing amounts do not include any part of the cost of substations and transmission facilities a portion of the capacity of which was on the said dates used for service to KU's customers outside Claiborne County.

Interrogatory No. 18:

18. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical facilities located within the corporate limits of Tazewell, Tennessee, as such corporate limits existed on the dates indicated, used exclusively in connection

with the sale and distribution of electricity to its customers in Tazewell, Tennessee:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

Answer:

As of July 1, 1957	$39,397.29
As of August 6, 1959	$46,374.66
As of November 7, 1963	$85,617.03.

The foregoing amounts do not include any part of the cost of KU's 69 KV (previously 34.5 KV) transmission line even within the corporate limits, or any part of the cost [fol. 59] of regulating equipment, materials and supplies including spare meters and transformers, office equipment, communication equipment, transportation equipment, stores and supplies or the like, or interests in real estate other than easements or rights-of-way for electrical facilities the cost of which is included in the amounts.

Interrogatory No. 19:

19. State the total depreciated book value, as carried on plaintiff's books and accounts, of plaintiff's electrical facilities located within the corporate limits of New Tazewell, Tennessee, as such corporate limits existed on the dates indicated, used exclusively in connection with the sale and distribution of electricity to its customers in New Tazewell, Tennessee:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint in this action was filed (November 7, 1963).

Answer:

As of July 1, 1957	$29,276.76
As of August 6, 1959	$31,563.58
As of November 7, 1963	$60,252.62.

The foregoing amounts do not include any part of the cost of materials and supplies including spare meters and transformers, office equipment, communication equipment, transportation equipment, stores and supplies or the like, or interests in real estate other than easements or rights-of-way for electrical facilities the cost of which is included in the amounts.

Interrogatory No. 20:

20. List and describe by date and other indicia sufficient for the complete identification thereof all maps, charts, drawings, or other documents which would show or indicate the location of electric customers of plaintiff within Claiborne County, Tennessee, as of July 1, 1957, August 6, 1959, and November 7, 1963. In the event that plaintiff does not have documents which would furnish the information requested as of the dates indicated, give the requested information as of such date nearest thereto for which the information is available, and as to each document give the name and address of the present custodian thereof.

[fol. 60] Answer:

In addition to the customer lists furnished in the Answers to Interrogatories 4, 5 and 6, other maps, etc., of which KU presently has knowledge which would show or indicate the location of its electric customers as requested in Interrogatory No. 20, are the following:

(a) A Geological Survey Map of portions of Claiborne County south of the Kentucky or Virginia and Tennessee State Lines, and including Tazewell and New Tazewell and surrounding areas, marked July 1, 1960 to show the "Territorial Boundary Lines Between KU Co. and Powell Valley R.E.C.C." in those areas indicated on the Map. The boundary of the northwest portion of the area served by KU in Claiborne County is not marked on this Map, since the territories served by KU and by Powell Valley do not adjoin in such area.

(b) Four detailed, larger scale maps, also marked July 1,

1960 to show, on such larger scale, boundary lines between KU and Powell Valley in portions of the territory shown on the Geological Survey Map.

(c). Map in two sheets of Tazewell and New Tazewell showing customers served by KU and Powell Valley.

Interrogatory No. 21:

21. List and describe all maps which were furnished by you to any Committee of Congress, or any member of Congress, in connection with the hearings which were held with respect to any of the bills leading up to the 1959 amendment to the TVA Act, and as to each give the name of the Committee, or member of Congress, to whom it was supplied, the date it was supplied, and the name and address of the custodian, or in the alternative, attach a copy of the map to your answer.

[fol. 61] Answer:

Map I—A map of "Kentucky Utilities Company and Subsidiary Territory Served," stated to show (*a*) counties lying in whole or part in the Tennessee River drainage basin, (*b*) KU territories in which rural cooperatives distributed TVA power and (*c*) other areas in which TVA power was used;

Map II—Map entitled "Expansion of TVA Service Area Under S. 931 and H.R. 3460," revised February 1959;

Map III—Map entitled "Kentucky Utilities Company and Subsidiary Territory Served", stated to show (*a*) area served exclusively by TVA and (*b*) towns served by KU which had made efforts to secure TVA power.

Maps I and II were supplied on March 11, 1959, to the House Committee on Public Works. Map III was supplied on June 10, 1959, to the Sub-Committee on Flood Control—Rivers and Harbors of the Senate Committee on Public Works. Map III was also furnished on March 27, 1959, to Honorable Carl Vinson, United States Congressman from Georgia.

Interrogatory No. 22:

22. State the highest total hourly kilowatt demand by plaintiff's customers during each of the months of

June 1957, July 1957, August 1959, and November 1963, in each of the following areas:

(a) Claiborne County, Tennessee.

(b) Tazewell, Tennessee, as the corporate limits then existed.

(c) New Tazewell, Tennessee, as the corporate limits then existed. In the event that plaintiff does not have records which would furnish the information requested on an hourly basis, give the requested information for such period of demand nearest thereto for which the information is available.

Answer:

Expressly denying the relevancy or materiality of some of the information requested in Interrogatory No. 22, KU states that the calculated kilowatt demands of its customers during the said months in the said areas were as follows:

[fol. 62]

	Claiborne County *	Tazewell	New Tazewell
June 1957	2338	355	349
July 1957	2502	338	385
August 1959	2208	419	501
November 1963	3136	700	619

* Calculated in part from 15 minute demands and in part from hourly demands.

s/ William A. Duncan.

Duly sworn to by William A. Duncan, jurat omitted in printing.

[fol. 63] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

INTERROGATORIES OF KENTUCKY UTILITIES COMPANY TO POWELL VALLEY ELECTRIC COOPERATIVE—Filed May 25, 1964

Pursuant to the provisions of Rule 33 and other applicable rules of the Federal Rules of Civil Procedure, the plaintiff, Kentucky Utilities Company (hereafter called "KU"), hereby serves upon the defendant, Powell Valley Electric Cooperative (hereafter called "Powell Valley"), the following written Interrogatories:

1. When and how did Powell Valley become qualified and authorized to engage in the sale and distribution of electric power in Tennessee?

2. As to the period from July 1, 1957, to the present, what if any authority, permit or franchise has Powell Valley had to sell and distribute electric power within the corporate limits of Tazewell, Tennessee, and as to any such authority, permit or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
[fol. 64] (c) For what period of time it was granted.
(d) Whether it is exclusive or nonexclusive.
(e) Describe any and all conditions or limitations pertaining thereto.

3. As to the period from July 1, 1957, to the present, what if any authority, permit or franchise has Powell Valley had to sell and distribute electric power within the corporate limits of New Tazewell, Tennessee, and as to any such authority, permit or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
(c) For what period of time it was granted.
(d) Whether it is exclusive or nonexclusive.
(e) Describe any and all conditions or limitations pertaining thereto.

4. List the names and addresses of all the electric power customers who were served by Powell Valley (whether for its own account or for the account of the City of Tazewell) within the corporate limits of Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.
(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).
(c) As of the date the complaint was filed (November 7, 1963).
(d) As of the date of service of your Answers to these Interrogatories.

5. List the names and addresses of all the electric power customers who were served by Powell Valley (whether for its own account or for the account of the City of New Tazewell) within the corporate limits of New Tazewell, Ten- [fol. 65] nessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.
(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).
(c) As of the date the complaint was filed (November 7, 1963).
(d) As of the date of service of your Answers to these Interrogatories.

6. What was the total number of kilowatt hours of electricity supplied by Powell Valley (whether for its own account or for the accounts of Tazewell or New Tazewell) to electric power consumers—

(a) In Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified, and
(b) In New Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified.

for each of the months of June 1957, July 1957, August 1959, October 1963, November 1963 and April 1964.

7. What was the highest total hourly kilowatt demand of electric power consumers supplied by Powell Valley

(whether for its own account or for the accounts of Tazewell or New Tazewell),

(a) In Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified, and
(b) In New Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified.

during each of the months of June 1957, July 1957, August 1959, October 1963, November 1963 and April 1964. If Powell Valley does not have records of the information requested [fol. 66] on an hourly basis, give the requested information for such period of demand nearest thereto for which the information is available.

8. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all maps, charts, drawings, or other documents in the possession, custody or control of Powell Valley which would show or indicate the location of electric consumers supplied by Powell Valley (whether for its own account or for the accounts of Tazewell or New Tazewell) within the corporate limits of Tazewell or New Tazewell on each of the dates set forth below, as such corporate limits existed on such dates:

(a) July 1, 1957.
(b) The date the 1959 amendment to the TVA Act became effective (August 6, 1959).
(c) The date the complaint in this action was filed (November 7, 1963).
(d) The date of service of your Answers to these Interrogatories.

In the event that Powell Valley does not have documents which would furnish the information requested for the dates indicated, give the requested information as of such date nearest thereto for which the information is available.

9. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all contracts of any nature between Powell Valley and Tennessee Valley Authority which are or have been in effect since July 1, 1957; and, with respect to any such contracts which are not in

effect on the date of the service of your Answers to these Interrogatories, state the date of termination of such contract.

[fol. 67] 10. State the names, addresses and occupations of all persons in any way employed by, associated with or representing or acting in any manner on behalf of Powell Valley who at any time after July 1, 1957, had any meeting or telephone conversation with, or wrote or sent any letter or writing of any kind to or received any letter or writing of any kind from, any of the other defendants or the United States Rural Electrification Administration, or any person employed by, associated with or representing or acting in any manner on behalf of any other defendant or the United States Rural Electrification Administration, concerning in any manner the supplying of any electric service by Powell Valley in Tazewell or New Tazewell, Tennessee.

11. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all correspondence, memoranda or other documents or writings of any nature in the possession, custody or control of Powell Valley concerning in any manner the supplying of electric service to Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957.

12. Do you contend that on July 1, 1957, Powell Valley and/or Tennessee Valley Authority were the primary source of power supply in the municipality of Tazewell, Tennessee? If so, state the bases for such contention.

13. Do you contend that on July 1, 1957, Powell Valley and/or Tennessee Valley Authority were the primary source of power supply in the municipality of New Tazewell, Tennessee? If so, state the bases for such contention.

s/ Malcolm Y. Marshall, James S. Welch, Ogden, Robertson & Marshall, 610 Marion E. Taylor Building, Louisville, Kentucky. John A. Rowntree, Claude K. Robertson, Fowler, Rowntree & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee. James D. Estep, Jr., Tazewell, Tennessee, Counsel for Plaintiff.

[fol. 68] Certificate of service (omitted in printing.)

[fol. 69] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

INTERROGATORIES OF KENTUCKY UTILITIES COMPANY TO TENNESSEE VALLEY AUTHORITY—Filed June 3, 1964

Pursuant to the provisions of Rule 33 and other applicable rules of the Federal Rules of Civil Procedure, the plaintiff, Kentucky Utilities Company, hereby serves upon the defendant, Tennessee Valley Authority (hereafter called "TVA"), the following written Interrogatories:

1. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all contracts of any nature between TVA and Powell Valley Electric Cooperative which are or have been in effect since July 1, 1957; and, with respect to any such contracts which are not in effect on the date of the service of your Answers to these Interrogatories, state the date of termination of such contract.

2. State the names, addresses and occupations of all persons in any way employed by, associated with or represent- [fol. 70] ing or acting in any manner on behalf of TVA who at any time after July 1, 1957, had any meeting or telephone conversation with or wrote or sent any letter or writing of any kind to or received any letter or writing of any kind from, any of the other defendants or any person employed by, associated with or representing or acting in any manner on behalf of any other defendant, concerning in any manner the supplying of electric service in Tazewell or New Tazewell, Tennessee. With respect to any meeting referred to above, state the date and location of such meeting and the names of all persons known to TVA to have been present at such meeting.

3. List and describe by date and other indicia sufficient for the complete identification thereof, including the name

and address of the present custodian, all correspondence, memoranda, minutes or other documents or writings of any nature, in the possession, custody or control of TVA, concerning in any manner the supplying of electric service in Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957.

4. List and describe all maps which were furnished by TVA to any committee of Congress, or any member of Congress, or were used or referred to by any representative of TVA in testifying before any committee of Congress, in connection with the hearings which were held with respect to any of the bills leading up to and including the 1959 amendment to the TVA Act, and as to each give the name of the committee or member of Congress to whom it was supplied, or the name of the committee before whom it was used or referred to, and the name of the representative of TVA who used or referred to it, the date it was supplied, used or referred to, and the name and address of the present custodian:

5. Do you contend that on July 1, 1957, TVA and/or Powell Valley Electric Cooperative were the primary source [fol. 71] of power supply in the municipality of Tazewell, Tennessee? If so, state the bases for such contention.

6. Do you contend that on July 1, 1957, TVA and/or Powell Valley Electric Cooperative were the primary source of power supply in the municipality of New Tazewell, Tennessee? If so, state the bases for such contention.

s/ Malcolm Y. Marshall, James S. Welch, Ogden, Robertson & Marshall, 610 Marion E. Taylor Building, Louisville, Kentucky. John A. Rowntree, Claude K. Robertson, Fowler, Rowntree & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee. James D. Estep, Jr., Tazewell, Tennessee, Counsel for Plaintiff.

Certificate of service (omitted in printing.)

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE.

Civil Action No. 4861

[Title omitted]

ANSWERS OF POWELL VALLEY ELECTRIC COOPERATIVE TO INTERROGATORIES SERVED BY KENTUCKY UTILITIES COMPANY—Filed June 30, 1964

Reserving all objections on grounds of relevancy, materiality or competency, the defendant, Powell Valley Electric Cooperative, hereby answers those Interrogatories served upon it by the plaintiff, Kentucky Utilities Company, on May 22, 1964:

Interrogatory No. 1:

1. When and how did Powell Valley become qualified and authorized to engage in the sale and distribution of electric power in Tennessee?

Answer:

Powell Valley became qualified and authorized to engage in the sale and distribution of electric power in Tennessee on September 23, 1940, by filing with the Secretary of State of Tennessee a certified copy of its Articles of Incorporation as a Virginia Corporation in compliance with Chapter 13, Acts of extraordinary session of 1929.

[fol. 73] Interrogatory No. 2:

2. As to the period from July 1, 1957, to the present, what if any authority, permit or franchise has Powell Valley had to sell and distribute electric power within the corporate limits of Tazewell, Tennessee, and as to any such authority, permit or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
(c) For what period of time it was granted.
(d) Whether it is exclusive or nonexclusive.
(e) Describe any and all conditions or limitations pertaining thereto.

Answer:

Franchise granted by Resolution of Quarterly County Court of Claiborne County, Tennessee.

(a) October 7, 1940.
(b) Quarterly County Court of Claiborne County, Tennessee.
(c) Unlimited.
(d) Nonexclusive.
(e) The Resolution granting the Franchise contains the following provisions: "Full right and permission is hereby granted to the Powells Valley Electric Cooperative above named to use the public roads, highways, and bridges, and rights of ways of said roads and bridges of Claiborne County, for the electric transmission lines, poles, transformer stations, and other equipment now or hereafter belonging to the or forming a part of the electrical system of the Powells Valley Electric Cooperative with its offices located at Jonesville, Virginia, provided that the public roads, highways and bridges, shall be used in such manner as to not unreasonably interfere with the use of such roads, highways and bridges by the public in general, but it is expressly agreed and understood that this franchise is not to inter- [fol. 74] fere in anyway with any other electrical or enterprise that may desire to bring electric lights, heat and power into Claiborne County, Tennessee."

Interrogatory No. 3:

3. As to the period from July 1, 1957, to the present, what if any authority, permit or franchise has Powell Valley had to sell and distribute electric power within the corporate limits of New Tazewell, Tennessee, and as to any such authority, permit or franchise, state the following:

(a) When it was granted.
(b) By whom it was granted.
(c) For what period of time it was granted.
(d) Whether it is exclusive or nonexclusive.
(e) Describe any and all conditions or limitations pertaining thereto.

Answer:

Franchise granted by Resolution of Quarterly County Court of Claiborne County, Tennessee.

(a) October 7, 1940.

(b) Quarterly County Court of Claiborne County, Tennessee.

(c) Unlimited.

(d) Nonexclusive.

(e) The Resolution granting the Franchise contains the following provisions: "Full right and permission is hereby granted to the Powells Valley Electric Cooperative above named to use the public roads, highways, and bridges, and rights of ways of said roads and bridges of Claiborne County, for the electric transmission lines, poles, transformer stations, and other equipment now or hereafter belonging to the or forming a part of the electrical system of the Powells Valley Electric Cooperative with its offices located at Jonesville, Virginia, provided that the public roads, highways and bridges, shall be used in such manner as to [fol. 75] not unreasonably interfere with the use of such roads, highways and bridges by the public in general, but it is expressly agreed and understood that this franchise is not to interfere in anyway with any other electrical or enterprise that may desire to bring electric lights, heat and power into Claiborne County, Tennessee."

Interrogatory No. 4:

4. List the names and addresses of all the electric power customers who were served by Powell Valley (whether for its own account or for the account of the City of Tazewell) within the corporate limits of Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

(d) As of the date of service of your Answers to these Interrogatories.

Answer:

(a) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of Tazewell, Tennessee, as of July 1, 1957, are contained in attached Exhibit No. 1.

(b) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of Tazewell, Tennessee, as of August 6, 1959, are contained in attached Exhibit No. 2.

(c) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of Tazewell, Tennessee, including those served for the account of the City of Tazewell, Tennessee, as of November 7, 1963, are contained in attached Exhibit No. 3.

(d) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of [fol. 76] Tazewell, Tennessee, including those served for the account of the City of Tazewell, Tennessee, as of May 25, 1964, this being the date of preparation of the Answer to this part of these Interrogatories, are contained in attached Exhibit No. 4.

Interrogatory No. 5:

5. List the names and addresses of all the electric power customers who were served by Powell Valley (whether for its own account or for the account of the City of New Tazewell) within the corporate limits of New Tazewell, Tennessee, on the following dates, as the corporate limits existed on those dates:

(a) As of July 1, 1957.

(b) As of the date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) As of the date the complaint was filed (November 7, 1963).

(d) As of the date of service of your Answers to these Interrogatories.

Answer:

(a) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of New Tazewell, Tennessee, as of July 1, 1957, are contained in attached Exhibit No. 5.

(b) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of New Tazewell, Tennessee, as of August 6, 1959, are contained in attached Exhibit No. 6.

(c) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of New Tazewell, Tennessee, including those served for the account of the City of New Tazewell, Tennessee, as of November 7, 1963, are contained in attached Exhibit No. 7.

(d) The names and addresses of the electric power consumers of Powell Valley within the corporate limits of New Tazewell, Tennessee, including those served for the account of the City of New Tazewell, Tennessee, as of May 25, 1964, [fol. 77] this being the date of preparation of the Answer to this part of these Interrogatories, are contained in attached Exhibit No. 8.

Interrogatory No. 6:

6. What was the total number of kilowatt hours of electricity supplied by Powell Valley (whether for its own account or for the accounts of Tazewell or New Tazewell) to electric power consumers—

(a) In Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified, and

(b) In New Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified,

for each of the months of June 1957, July 1957, August 1959, October 1963, November 1963 and April 1964.

Answer:

The kilowatt hours of electricity supplied by Powell Valley (whether for its own account or for the accounts of Tazewell or New Tazewell) to electric power consumers in Tazewell, Tennessee, and New Tazewell, Tennessee, for the months cited were as follows:

	Tazewell	New Tazewell
June 1957	11,368	3,024
July 1957	11,410	3,356
August 1959	13,062	6,304
October 1963	60,180	27,735
November 1963	113,175	50,127
April 1964	182,362	79,298

Interrogatory No. 7:

7. What was the highest total hourly kilowatt demand of electric power consumers supplied by Powell Valley [fol. 78] (whether for its own account or for the accounts of Tazewell or New Tazewell),

(a) In Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified, and

(b) In New Tazewell, Tennessee, as its corporate limits existed on each date hereafter specified,

during each of the months of June 1957, July 1957, August 1959, October 1963, November 1963 and April 1964. If Powell Valley does not have records of the information requested on an hourly basis, give the requested information for such period of demand nearest thereto for which the information is available.

Answer:

Powell Valley does not have a record showing the highest total hourly kilowatt demand of electric power consumers supplied by Powell Valley (whether for its own account or for the accounts of Tazewell or New Tazewell) for the months indicated nor does Powell Valley have the information requested for any other period.

Interrogatory No. 8:

8. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all maps, charts, drawings, or other documents in the possession, custody or control of Powell Valley which would show or indicate the location of electric consumers supplied by Powell Valley(whether for its own account or for the accounts of Tazewell or New Tazewell) within the corporate limits of Tazewell or New Tazewell on each of the dates set forth below, as such corporate limits existed on such dates:

(a) July 1, 1957.

(b) The date the 1959 amendment to the TVA Act became effective (August 6, 1959).

(c) The date the complaint in this action was filed (November 7, 1963).

(d) The date of service of your Answers to these Interrogatories.

[fol. 79] In the event that Powell Valley does not have documents which would furnish the information requested for the dates indicated, give the requested information as of such date nearest thereto for which the information is available.

Answer:

(a) Map entitled "Customers and Lines of T. V. A. Power Distributors as of July 1, 1957, in Claiborne County, Tennessee." Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of July 1, 1957, Tazewell and New Tazewell, Claiborne County, Tennessee." Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of March 30, 1964, Tazewell and New Tazewell, Claiborne County, Tennessee."

(b) Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of August 6, 1959, Tazewell and New Tazewell, Claiborne County, Tennessee." Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate

Limits as of March 30, 1964, Tazewell and New Tazewell, Claiborne County, Tennessee."

(c) Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of November 7, 1963, Tazewell and New Tazewell, Claiborne County, Tennessee." Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of March 30, 1964, Tazewell and New Tazewell, Claiborne County, Tennessee."

(d) Map of both Tazewell and New Tazewell entitled "Distribution Lines, Customers and Corporate Limits as of March 30, 1964, Tazewell and New Tazewell, Claiborne County, Tennessee." (This being the date nearest to the [fol. 80] date of service of the Answers to these Interrogatories, that such maps are available.)

All maps are in the custody of Ralph B. Miner, Manager, Powell Valley Electric Cooperative, Jonesville, Virginia.

Interrogatory No. 9:

9. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all contracts of any nature between Powell Valley and Tennessee Valley Authority which are or have been in effect since July 1, 1957; and, with respect to any such contracts which are not in effect on the date of the service of your Answers to these Interrogatories, state the date of termination of such contract.

Answer:

All contracts of any nature between Powell Valley and Tennessee Valley Authority which are or have been in effect since July 1, 1957, and which are in the custody of Ralph B. Miner, Manager, Powell Valley Electric Cooperative, Jonesville, Virginia, are listed by date and shown on Exhibit No. 9.

Interrogatory No. 10:

10. State the names, addresses and occupations of all persons in any way employed by, associated with or representing or acting in any manner on behalf of

Powell Valley who at any time after July 1, 1957, had any meeting or telephone conversation with, or wrote or sent any letter or writing of any kind to or received any letter or writing of any kind from, any of the other defendants or the United States Rural Electrification Administration, or any person employed by, associated with or representing or acting in any manner on behalf of any other defendant or the United States Rural Electrification Administration, concerning in any manner the supplying of any electric service by Powell Valley in Tazewell or New Tazewell, Tennessee.

[fol. 81] Answer:

In answer to Interrogatory No. 10, Powell Valley is submitting a list contained in attached Exhibit No. 10 of all its employees, directors and counsel who were employed by Powell Valley on or after July 1, 1957.

Interrogatory No. 11:

11. List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all correspondence, memoranda or other documents or writings of any nature in the possession, custody or control of Powell Valley concerning in any manner the supplying of electric service to Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957.

Answer:

Based upon a reasonable search of its records, the attached Exhibit No. 11 contains a list of all correspondence, memoranda or other documents or writings of any nature in the possession, custody or control of Powell Valley concerning in any manner the supplying of electric service to Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957, which information is in the custody of Ralph B. Miner, Manager, Powell Valley Electric Cooperative, Jonesville, Virginia.

Interrogatory No. 12:

12. Do you contend that on July 1, 1957, Powell Valley and/or Tennessee Valley Authority were the primary source of power supply in the municipality of Tazewell, Tennessee? If so, state the bases for such contention.

Answer:

Yes, because the municipality of Tazewell, Tennessee, is inside the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

[fol. 82] Interrogatory No. 13:

13. Do you contend that on July 1, 1957, Powell Valley and/or Tennessee Valley Authority were the primary source of power supply in the municipality of New Tazewell, Tennessee? If so, state the bases for such contention.

Answer:

Yes, because the municipality of New Tazewell, Tennessee, is inside the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

s/ Ralph B. Miner.

Duly sworn to by Ralph B. Miner, jurat omitted in printing.

[fol. 83] Certificate of service (omitted in printing.)

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

ANSWERS OF DEFENDANT TENNESSEE VALLEY AUTHORITY TO INTERROGATORIES PROPOUNDED BY PLAINTIFF—Filed July 8, 1964.

The defendant Tennessee Valley Authority makes the following answers to the interrogatories of plaintiff which were served on it on May 29, 1964, pursuant to Rule 33 of the Federal Rules of Civil Procedure:

Interrogatory 1

List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all contracts of any nature between TVA and Powell Valley Electric Cooperative which are or have been in effect since July 1, 1957; and, with respect to any such contracts which are not in effect on the date of the service of your Answers to these Interrogatories, state the date of termination of such contract.

Answer

To the best of defendant's present knowledge, information, and belief, the following is a list of all contracts between TVA and Powell Valley Electric Cooperative which are or have been in effect since July 1, 1957. The termination date of any such contract which was not in effect on June 22, 1964, the date upon which this answer was prepared, is set forth. Walter A. Jensen, Chief, Auditing Branch, 218 Old Post Office Building, Knoxville, Tennessee, is the custodian of items numbered 1 through 22. Walter J. Arrants, Manager of Properties, Eastern Branch, P. O. Box 1326 Morristown, Tennessee, is the custodian of items numbered 23 through 39.

[fol. 85] 1. TV-89622. *Power Contract between Tennessee Valley Authority and Powell Valley Electric Cooperative,* September 8, 1945.

2. TV-89622, Supplement #1. *Amendatory and Supplemental Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* January 11, 1947.

3. TV-12735A. *Electrical Development Contract between Tennessee Valley Authority and Powell Valley Electric Cooperative,* January 1, 1952.

4. TV-12890A. *Agreement among Tennessee Valley Authority, Powell Valley Electric Cooperative, Old Dominion Power Company, and Kentucky Utilities Company,* January 21, 1952. (Terminated effective December 15, 1961, by TV-22721A, dated June 22, 1961.)

5. TV-14190A. *Agreement among Tennessee Valley Authority, Powell Valley Electric Cooperative, and Kentucky Utilities Company,* October 8, 1952.

6. TV-15505A. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative for Installation, Maintenance, and Operation of Oil Circuit Breaker,* April 18, 1953.

7. TV-89622, Supplement #4.
TV-11521A, Supplement #1. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* April 18, 1953.

8. TV-15515A. *License Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* October 14, 1953.

9. TV-89622, Supplement #5. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* January 12, 1955. (Terminated effective October 18, 1961, by TV-89622, Supplement #9, dated August 18, 1961.)

10. TV-18555A. *Letter Agreement,* September 29, 1955. (Terminated September 20, 1957.)

11. TV-89622, Supplement #6. *Letter Agreement,* March 12, 1956.

12. TV-89622, Supplement #7. *Supplemental Agreement Relating to Industrial Service between Tennessee*

Valley Authority and Powell Valley Electric Cooperative, May 9, 1956.

13. TV-18861A. *Emergency Operation Contract between Tennessee Valley Authority and Powell Valley Electric Cooperative,* July 1, 1956.
14. TV-89622, Supplement #8. *Letter Agreement,* August 20, 1956. (Terminated effective October 18, 1961, by TV-89622, Supplement #9, dated August 18, 1961.)
15. TV-19160A. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* November 2, 1956.
16. TV-19264A. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative for Installation, Maintenance, and Operation of Voltage Regulator,* January 1, 1957.
17. TV-22711A. *Letter Agreement,* May 23, 1961.

[fol. 86] 18. TV-22721A. *Agreement among Tennessee Valley Authority, Powell Valley Electric Cooperative, Old Dominion Power Company, and Kentucky Utilities Company,* June 22, 1961.

19. TV-89622, Supplement #9. *Agreement between Tennessee Valley Authority and Powell Valley Electric Cooperative,* August 18, 1961.
20. TV-89622, Supplement #10. *Letter Agreement,* December 18, 1961.
21. TV-7575A. *Electric Service Agreement,* May 5, 1950.
22. TV-13364A. *Electric Service Agreement,* June 9, 1952.
23. 1124.1. *License Agreement for Occupancy and Use of Lands for Maintenance of Electric Distribution Line,* February 1, 1941.
24. 1124.8. *License Agreement for Occupancy and Use of Land for Right-of-Way,* June 28, 1946.
25. 1124.24. *License Agreement for Occupancy and Use of Land for Right-of-Way,* June 1, 1948.
26. 1124.26. *License Agreement for Occupancy and Use of Land for Right-of-Way,* October 12, 1948.
27. 1124.40. *License Agreement for Occupancy and Use of Land for Right-of-Way,* January 12, 1950.
28. 1124.47. *License Agreement for Occupancy and Use of Land for Right-of-Way,* February 5, 1951.

29. 1124.56. *License Agreement for Occupancy and Use of Land for Right-of-Way,* December 4, 1951.
30. 1124.60. *License Agreement for Occupancy and Use of Land for Right-of-Way,* April 23, 1952.
31. 1124.62. *License Agreement for Occupancy and Use of Land for Right-of-Way,* November 18, 1952.
32. 1124.73. *License Agreement for Occupancy and Use of Land for Right-of-Way,* September 8, 1954.
33. 1124.82. *License Agreement for Occupancy and Use of Land for Right-of-Way,* December 12, 1955.
34. 1124.85. *License Agreement for Occupancy and Use of Land for Right-of-Way,* April 27, 1956.
35. 1165.28. *License Agreement for Occupancy and Use of Land for Right-of-Way,* July 2, 1957.
36. 1165.34. *License Agreement for Occupancy and Use of Land for Right-of-Way,* December 6, 1957.
37. 1165.48. *License Agreement for Occupancy and Use of Land for Right-of-Way,* September 28, 1959.
38. 1165.49. *License Agreement for Occupancy and Use of Land for Right-of-Way,* October 8, 1959.
39. 1165.65. *License Agreement for Occupancy and Use of Land for Right-of-Way,* March 8, 1963.

[fol. 87] Interrogatory 2

State the names, addresses and occupations of all persons in any way employed by, associated with or representing or acting in any manner on behalf of TVA who at any time after July 1, 1957, had any meeting, or telephone conversation with or wrote or sent any letter or writing of any kind to or received any letter or writing of any kind from, any of the other defendants or any person employed by, associated with or representing or acting in any manner on behalf of any other defendant, concerning in any manner the supplying of electric service in Tazewell or New Tazewell, Tennessee. With respect to any meeting referred to above, state the date and location of such meeting and the names of all persons known to TVA to have been present at such meeting.

Answer

Defendant is unable to provide all of the information called for in this interrogatory because its records may not indicate every instance in which an officer or employee may

have acted in some manner with respect to the matters referred to in this interrogatory. To the best of defendant's present knowledge, information and belief, however, the following list contains the names, addresses and occupations of those officers and employees (exclusive of clerical and secretarial employees) who acted, may have acted, or ordinarily would be expected to have acted, in some manner with respect to the matters referred to therein.

1. Paul S. Button, Director, Division of Power Marketing, 815 Power Building, Chattanooga, Tennessee
2. E. H. Drum, Attorney, Division of Law, 619 New Sprankle Building, Knoxville, Tennessee
3. Brooks Hays, former member Board of Directors; presently Professor, Rutgers University, New Brunswick, New Jersey
4. C. Wilson House, District Manager, Eastern District, 26 Union Avenue Building, Knoxville, Tennessee
5. A. R. Jones, Vice Chairman, Board of Directors, 404 New Sprankle Building, Knoxville, Tennessee
6. R. A. Kampmeier, former Assistant Manager of Power; presently Consulting Engineer, 1742 Crestwood Drive, Chattanooga, Tennessee
7. Charles J. McCarthy, General Counsel, 629 New Sprankle Building, Knoxville, Tennessee.
8. Thomas A. Pedersen, Assistant General Counsel, 655 New Sprankle Building, Knoxville, Tennessee
9. C. A. Reidinger, Attorney, Division of Law, 619 New Sprankle Building, Knoxville, Tennessee
10. Frank E. Smith, Director, 405 New Sprankle Building, Knoxville, Tennessee

[fol. 88] 11. L. J. Van Mol, General Manager, 411 New Sprankle Building, Knoxville, Tennessee

12. Herbert D. Vogel, former Chairman, Board of Directors; presently Engineer Advisor, International Bank for Reconstruction and Development, 1818 H Street, N.W., Washington, D. C.
13. A. J. Wagner, Chairman of the Board, 403 New Sprankle Building, Knoxville, Tennessee
14. Lewis E. Wallace, Attorney, Division of Law, 616 New Sprankle Building, Knoxville, Tennessee
15. James W. Ward, Jr., District Administrative Assist-

ant, 26 Union Avenue Building, Knoxville, Tennessee

16. J. E. Watson, Assistant Manager of Power, 818 Power Building, Chattanooga, Tennessee
17. T. Graham Wells, Jr., Chief, Distributor Marketing Branch, 813 Power Building, Chattanooga, Tennessee
18. G. O. Wessenauer, Manager of Power, 818 Power Building, Chattanooga, Tennessee

Subject to the limitations set forth above, the following is a list giving the date and location of those meetings which a reasonable search of defendant's records has revealed concerning the supplying of electric service in Tazewell or New Tazewell, Tennessee, together with the names of all persons known to defendant to have been present at such meetings.

1. Meeting in Knoxville on February 4, 1960, attended by Herbert D. Vogel, A. R. Jones, Brooks Hays, A. J. Wagner, G. O. Wessenauer, R. A. Kampmeier, and J. E. Watson for TVA. Also present were Mayor Hubert F. White, Lee Campbell, Lee Rennebaum, and R. R. Long of Middlesboro, Kentucky; Tom Fugate of Ewing, Virginia; and Lawrence Russell of Tazewell, Tennessee.
2. Meeting in Knoxville on August 15, 1961, attended by Messrs. William R. Stanifer, Bill DeBusk, and Paris Coffey. TVA was represented by Paul S. Button, Lewis E. Wallace and C. Wilson House.
3. Meeting in New Tazewell on April 12, 1962, attended by Paul S. Button, C. A. Reidinger, and C. Wilson House of TVA. Also attending were J. M. Campbell, [fol. 89] Glen McCullough, E. J. Hardin III, Douglas Overton, Rome Cardwell, Joe F. Essary, Ray Neely, Edward M. Duncan, Lloyd Moyers, William R. Stanifer, Harry B. Rowe, F. E. Berry, Bill DeBusk, Reed Bailey, Ralph Miner, and Paris Coffey.
4. Meeting in Knoxville on November 15, 1962; attended by C. Wilson House, T. Graham Wells, Jr., C. A. Reidinger for TVA and Ralph Miner, and Clyde Y. Cridlin for Powell Valley Electric Cooperative.

5. Meeting in Knoxville on November 27, 1962, attended by Paul S. Button, C. Wilson House, and E. H. Drum of TVA. Also present were Joe F. Essary, Bill DeBusk, William R. Stanifer, Paris Coffey, Dr. William Smith, Ralph B. Miner, and Clyde Y. Cridlin.
6. Meeting in Knoxville on June 14, 1963, attended by Paul S. Button, C. Wilson House, C. A. Reidinger for TVA; Ralph B. Miner and Clyde Y. Cridlin for Powell Valley Electric Cooperative.
7. Meeting in Knoxville on September 5, 1963, attended by Paul S. Button, T. Graham Wells, Jr., C. A. Reidinger, E. H. Drum, C. Wilson House for TVA. Also present were Philip Ardery and Ralph Miner.

Interrogatory 3

List and describe by date and other indicia sufficient for the complete identification thereof, including the name and address of the present custodian, all correspondence, memoranda, minutes or other documents or writings of any nature, in the possession, custody or control of TVA, concerning in any manner the supplying of electric service in Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957.

Answer

Based upon a reasonable search of defendant's records and files and to the best of defendant's present knowledge, information, and belief, Exhibit A attached hereto is a list of all correspondence, memoranda, minutes or other documents or writings of any nature in defendant's possession, [fol. 90] custody or control concerning in any manner the supplying of electric service in Tazewell or New Tazewell, Tennessee, at any time after July 1, 1957. The documents listed are contained in numerous files and records located in many different offices within TVA and are, therefore, in the custody of various of defendant's employees. A copy of each document listed is in the custody of Charles J. McCarthy, General Counsel, 629 New Sprankle Building, Knoxville, Tennessee.

Interrogatory 4

List and describe all maps which were furnished by TVA to any committee of Congress, or any member of Congress, or were used or referred to by any representative of TVA in testifying before any committee of Congress, in connection with the hearings which were held with respect to any of the bills leading up to and including the 1959 amendment to the TVA Act, and as to each give the name of the committee or member of Congress to whom it was supplied, or the name of the committee before whom it was used or referred to, and the name of the representative of TVA who used or referred to it, the date it was supplied, used or referred to, and the name and address of the present custodian.

Answer

The following maps were used or referred to by TVA representatives in testifying before committees of Congress with respect to bills leading up to and including the 1959 amendment to the TVA Act.

1. Map entitled "Tennessee Valley Authority—Major Construction Projects—April 1955," supplied to the Subcommittee on Flood Control, Rivers and Harbors, of the Senate Committee on Public Works and referred to during hearings held on July 21, 22 and 27, 1955, by Herbert D. Vogel, Chairman of the Board of Directors, G. O. Wessenauer, Manager of Power, and Joseph C. Swidler, General Counsel.
2. Map entitled "The TVA System—Dams and Steam Plants—January 1957," supplied to the Subcommittee on Flood Control of the House of Representatives Committee on Public Works and referred to during hearings held on March 28, 29, April 1, 2, 3, 5, and May 6 and 7, 1957, by G. O. Wessenauer, Manager of Power.

[fol. 91] 3. Untitled map colored blue, pink and grey, supplied to the Committee on Public Works, House of Representatives, and referred to during hearings held on March 10 and 11, 1959, by G. O. Wessenauer, Manager of Power.

Copies of the above maps are in the custody of Charles J. McCarthy, General Counsel, 629 New Sprankle Building, Knoxville, Tennessee.

Interrogatory 5

Do you contend that on July 1, 1957, TVA and/or Powell Valley Electric Cooperative were the primary source of power supply in the municipality of Tazewell, Tennessee? If so, state the bases for such contention.

Answer

Yes, because Tazewell was, and is, inside the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

Interrogatory 6

Do you contend that on July 1, 1957, TVA and/or Powell Valley Electric Cooperative were the primary source of power supply in the municipality of New Tazewell, Tennessee? If so, state the bases for such contention.

Answer

Yes, because New Tazewell was, and is, inside the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

Tennessee Valley Authority. s/ By Lewis E. Wallace.

[fol. 92] Duly sworn to by Lewis E. Wallace, jurat omitted in printing.

[fol. 93] Certificate of Service (omitted in printing.)

[fol. 94] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

ORDER—September 2, 1964

It is Ordered that the objections of Kentucky Utilities Company to interrogatories Nos. 23 and 24 propounded by the Tennessee Valley Authority be, and same hereby are, sustained.

The information sought by the interrogatories may be considered at pre-trial.

Enter:

Robert Taylor, United States District Judge.

[File endorsement omitted.]

[fol. 95] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

STIPULATION AND AGREEMENT—Filed September 10, 1964

It is hereby stipulated and agreed by and among all parties to this action that, subject to objections to admissibility into evidence on grounds of relevancy or materiality, all of which objections are hereby expressly reserved, the documents hereafter listed may be offered in evidence by any party without objection on the ground of competency and without further authentication:

1. Photostatic copy of certified copy of Minutes of April 5, 1926 meeting of the Quarterly County Court of Claiborne County, Tennessee, as recorded in Minute Book J, Page 567, of the records of such Court:
2. Photostatic copy of certified copy of an Order of the Railroad & Public Utilities Commission of Tennessee entered October 15, 1926, in Docket No. 1178 on the Docket of such Commission;
3. Photostatic copy of certified copy of Minutes of a meeting of the Quarterly County Court of Claiborne County, Tennessee, held on the first Monday in July, 1952, as recorded in Minute Book Q, Page 63, of the records of such Court;
4. Photostatic copy of certified copy of an Order of the Railroad & Public Utilities Commission of Tennessee entered May 25, 1954, in Docket No. U-3484 on the Docket of such Commission;
5. Photostatic copy of certified copy of an instrument entitled "Instrument of Conveyance and Bill of Sale," dated July 31, 1954, by Dixie Power & Light Company to Kentucky Utilities Company, as recorded in Book of Deeds 13, Pages 173-4 in the Office of the Register of Deeds of Claiborne County, Tennessee;

6. Map showing Location of Buildings Served by KU and PVEC within Tazewell and New Tazewell, designated Drawing No. C-84, dated April 24, 1964;

[fol. 96] 7. Hand-colored photostatic copy of portion of Map of Tennessee Valley Authority Transmission System, designated Map L2, dated July 1960, for identification marked on the reverse side ML-1; and

8. Photographs, for identification marked on the reverse side ML-2 through ML-9.

9. Copy of map entitled "Expansion of TVA Service Area Under S. 931 and H.R. 3460," revised February 1959 by the National Association of Electric Companies, furnished by Kentucky Utilities to the Committee on Public Works, House of Representatives, during hearings held on March 10 and 11, 1959, for identification marked on reverse side TVA-1.

10. Copy of map entitled "Customers and Lines of TVA Power Distributors As Of July 1, 1957, in Claiborne County, Tennessee," for identification marked on the reverse side TVA-2.

11. Copy of map entitled "Distribution Lines, Customers and Corporate Limits As Of July 1, 1957, Tazewell and New Tazewell, Claiborne County, Tennessee," for identification marked on reverse side TVA-3.

12. Copy of map entitled "Distribution Lines, Customers and Corporate Limits As Of March 30, 1964, Tazewell and New Tazewell, Claiborne County, Tennessee," for identification marked on reverse side TVA-4.

13. Any or all portions of the Congressional Record, committee hearings, and committee reports relating to the Legislative history of the 1959 amendment to the TVA Act.

14. Copy of certified copy of minutes of the Quarterly County Court of Claiborne County, Tennessee, of the October 7, 1940 meeting of said Court as recorded in Minute Book O, Page 531, of the Records of said Court.

15. Copy of a certificate of the State of Tennessee, Department of State, dated September 23, 1940, certifying that Powell Valley Electric Cooperative qualified to do business in the State of Tennessee on September 23, 1940.

[fol. 97] It is further hereby stipulated and agreed by and among all parties hereto that the following Answers to Interrogatories are true and accurate:

Answers of Kentucky Utilities Company to Interrogatories Nos. 4, 5, 6 and 7 served upon Kentucky Utilities Company by Tennessee Valley Authority on April 1, 1964; and

Answers of Powell Valley Electric Cooperative to Interrogatories Nos. 4, 5 and 6 served upon Powell Valley Electric Cooperative by Kentucky Utilities Company on May 22, 1964;

and that, subject to all objections on grounds of relevancy or materiality but without further proof or authentication from records or otherwise, the facts contained in such Answers and Exhibits referred to therein may be offered in evidence by any party through testimony of witnesses or otherwise.

It is further hereby stipulated and agreed by and among all parties hereto, subject to all objections on grounds of relevancy and materiality but without further proof or authentication from records or otherwise, that:

1. As of July 1, 1957, TVA distributors of electric power (Powell Valley Electric Cooperative and City of LaFollette Electric System) served a total of 3,564 customers within Claiborne County, Tennessee, and on the same date Kentucky Utilities Company served 1,839 customers within Claiborne County.
2. As of July 1, 1957, Powell Valley Electric Cooperative (a TVA distributor) served a total of 28 customers within the city limits of Tazewell and New Tazewell, Tennessee, and on the same date Kentucky Utilities Company served 561 customers within the city limits of those two towns.
3. During the months of June and July 1957, TVA distributors (Powell Valley Electric Cooperative and City of LaFolette Electric System) supplied an average of approximately 1,015,000 kwh of electricity per month to their customers within Claiborne County, Tennessee, and during the same period Kentucky Utilities Company supplied an average of approximately 610,000

kwh per month to its customers in Claiborne County, Tennessee.

4. In 1957 the depreciated book value of plant investment in distribution facilities of electric distributors within Claiborne County, Tennessee, was as follows:

(a) TVA distributors (Powell Valley Electric Cooperative, as of January 10, 1957, and City of La-Follette Electric System, as of June 30, 1957): $902,999.17

(b) Kentucky Utilities Company (as of June 30, 1957): $457,947.93

[fol. 98] 5. In 1957 the depreciated book value of plant investment in distribution facilities of electric distributors within the city limits of the towns of Tazewell and New Tazewell, Tennessee, was as follows:

(a) TVA distributor (Powell Valley Electric Cooperative, as of January 10, 1957): $8,532

(b) Kentucky Utilities Company (as of June 30, 1957): $68,674.05

This Stipulation and Agreement may be introduced into and made a part of the evidence herein by any party hereto.

s/ Malcolm Y. Marshall, Counsel for Kentucky Utilities Company. s/ Charles J. McCarthy, Counsel for Tennessee Valley Authority. s/ Clyde W. Cridlin, Counsel for Powell Valley Electric Cooperative. s/ Philip P. Ardery, Counsel for Edward J. Hardin and James B. DeBusk.

Dated September 10, 1964.

[fols. 99-100] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

DEPOSITION OF:

Mr. Ralph B. Miner—Filed September 10, 1964

Jonesville, Virginia
August 20, 1964.

[fol. 101]

Exhibits

Number	Description
1	Indenture between Powell Valley Electric Cooperative and Dominion National Bank as Trustee, recorded Trust Book 70, pages 492-502, Claiborne County, Tennessee
2	Computation of per cent of power from Tazewell substation delivered to Claiborne County, Tennessee, as of July 1, 1957
3	Computation of per cent of power from Fitts Gap substation delivered to Claiborne County, Tennessee in 1957
4	Electricity rate schedule of Powell Valley Electric Cooperative
5	Notes of meeting held 4-12-62, at Cedar Grove between representatives of Tazewell, New Tazewell, TVA, Powell Valley Electric Cooperative
6	Letter, October 23, 1962, Stanifer to Miner
7	Notes on meeting held 11-6-62, Washington, D.C., between representatives of REA and Ralph Miner
8	Notes on meeting held 11-15-62, TVA, Knoxville, between representatives of TVA and Powell Valley Electric Cooperative
9	Notes on meeting held 11-27-62, TVA, Knoxville, between representatives of TVA, Tazewell, New Tazewell, and Powell Valley Electric Cooperative

[fol. 102]

10	Notes on meeting held 12-18-62, Tazewell, between representatives of Tazewell, New Tazewell, Powell, Valley Electric Cooperztive, Claiborne County Chamber of Commerce, and Mr. R. H. Cottrell, Jr.
11	Notes on meeting held 2-12-63, Tennessee Rural Electric Cooperative Association Building, Nashville, between representatives of TRECA and Powell Valley Electric Cooperative
12	Letter, 8-29-63, Callaway to Miner
13	Tazewell-New Tazewell Power Board Accounts as of August 21, 1964
14	Summary by Miner of knowledge of Tazewell-New Tazewell Power Situation, undated

[fol. 103] Depositions

This pre-trial deposition of Mr. Ralph B. Miner, Representative of the Defendant, Powell Valley Electric Cooperative, is taken at the request of the Plaintiff, pursuant to notice, copy of which is attached hereto, and by agreement, pursuant to Rule 26, Federal Rules of Civil Procedure, before Georgella Mankin, Court Reporter, and Mr. Clyde Y. Cridlin, Commissioner in Chancery for Lee County, Virginia, on the 20th day of August, 1964, in the offices of the Defendant, Powell Valley Electric Cooperative, Jonesville, Virginia.

It is agreed that after the deposition has been transcribed, the name of the witness may be signed by Mr. Cridlin as Commissioner in Chancery for Lee County, Virginia, the signature of the witness being hereby waived.

The parties did not invoke the rule at this time, and Mr. Lewis, a representative of the Plaintiff, was present in the deposition room without waiving his rights to testify as a witness in this cause.

All formalities as to caption, certificate, transmission, etc., are hereby waived.

[fol. 104] Ralph B. Miner, a representative of the Defendant, Powell Valley Electric Cooperative, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?
A. Ralph Miner.
Q. Where do you live, Mr. Miner?
A. I live near Jonesville.
Q. Is that Virginia?
A. Jonesville, Virginia, yes, sir.
Q. What is your position?
A. I'm manager of the Powell Valley Electric Cooperative.

Q. And how long have you been in that position?
A. Since about the first of May in '62, 1962.
Q. And what was your position before that?
A. Well, immediately before that I was a superintendent.
Q. Of Powell Valley?
A. Of Powell Valley, of an area of Powell Valley.
Q. And that's the cooperative we are talking about, had an area that you were superintendent of?
A. Of the Jonesville area, yes, sir.
[fol. 105] Q. How long did you hold the job of superintendent and did you——
A. About four years, roughly.
Q. And did you stay in the same area that whole time?
A. Well, I was in that area, I worked in different places, but generally I was responsible for this Jonesville area.
Q. Apparently you worked in other areas besides the Jonesville area?
A. Oh, yeah.
Q. Did the cooperative have more than one superintendent, or were you the only superintendent?
A. Well, we didn't have job classifications, but I suppose that we had a superintendent at Tazewell. He was referred to at times as local manager and different things, but he was the superintendent, I'd say.
Q. Who was that man at Tazewell?
A. Mr. Rowe.
Q. Mr. Harry Rowe?
A. At that time; it's Mr. Sandefur now.
Q. What is Mr. Sandefur's full name?
A. Earl Sandefur.
Q. Is he a resident of Tazewell or in that vicinity?
A. He lives in that vicinity; he doesn't live in the town.
[fol. 106] Q. What is your duties as general manager of the cooperative? You just have administrative head of the whole operation, I take it?
A. Yes, sir, I'm responsible for coordination of the organization, the—I help the Board with any planning that I can, recommendations, responsible for the personnel of the cooperative.
Q. And what was your duties as superintendent? Is that an engineering function, or what was it?
A. Well, that's supervision of a group of operations

personnel, supervision of certain construction. I did part of the surveying, I drew some work orders—well, in fact, I drew all of the work orders for my section or division.

Q. Sort of an operational function?

A. It would be more of an operational function, yes, sir.

Q. Is Powell Valley Electric Cooperative a Virginia corporation?

A. Yes, sir.

Q. Is it organized under the Rural Electrification Act of Virginia, Rural Electrification Cooperative Act of Virginia?

A. I'm afraid I couldn't answer that, because I'm not too familiar with the—I've seen the incorporation papers, [fol. 107] but that's about as much as I can say about it.

Q. Do you have a copy of the charter here so we could see——

A. Yes, sir, we do have.

Mr. Rowntree: I'd like to check that, or can counsel tell us?

Mr. Cridlin: Well, I think it is, but you can check the charter if you want to.

They'll have it in here in a minute.

Mr. Rowntree: All right, we'll go ahead.

By Mr. Rowntree:

Q. I take it that the cooperative has a Board of Directors?

A. Yes, sir.

Q. And it has a membership, do you have members of the cooperative?

A. Yes, sir.

Q. And how are members selected? What is the general position of a member in the cooperative? How does he come in, and what is his rights as a member? Can you give us a general idea of the position of a member?

A. Well, he signs an application for membership and pays a five dollar membership fee. Then the Board accepts him generally, or he can be accepted by an annual meeting of the members of the cooperative, but the Board does have [fol. 108] the right, I think, to accept him. Then he has the right to vote in the election of directors to decide who shall be a director and who will operate the cooperative in that respect.

Q. That's done at an annual meeting?
A. At an annual meeting of members.
Q. Does the board select the officers?
A. They select the manager.

(The charter was handed to counsel.)

Q. In reading from the charter, which has been produced, I observe that these incorporators do, quote:

> "Do hereby associate themselves to establish an electric cooperative under and by virtue of Chapter 159A of the Code of Virginia, 1936, under the cooperative name hereinafter mentioned."

As an electric cooperative thus chartered, were you eligible for REA loans under the Federal Act?
A. Yes, sir.
Q. And did you obtain loans from the REA?
A. Yes, sir.

Q. I have here a certified copy of indenture between Powell Valley Electric Cooperative and Dominion National Bank as Trustee, recorded in Trust Book 70, page 492-505, in the Register's office, Claiborne County, Tennessee.
Do you recognize that as being the mortgage instrument or trust deed securing loans received from the REA?
[fol. 109] A. Now what was the question?

Mr. Rowntree: Read the question.

(The last question was read by the reporter.)

The Witness: Yes, sir.
Mr. Rowntree: I'd like to file that as Exhibit No. 1.

(The trust deed referred to was marked for identification as Exhibit No. 1, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now where does Powell Valley Electric Cooperative receive its power from? From what source does it obtain power?
A. From TVA.
Q. All of it?
A. Yes, sir. I'll have to qualify that. We receive it

through KU at Tazewell and from Old Dominion Power Company at Stony Creek, but we pay TVA for it all. It's all on one bill.

Q. It becomes TVA power when you draw it?

A. As far as we are concerned, it is TVA power.

Q. Now does the cooperative have operations in Tennessee?

A. Yes, sir.

[fol. 110] Q. I don't suppose you had to qualify under the state law of Tennessee as a foreign corporation, or are you familiar with that phase there?

A. Well, we had some sort of a charter from Tennessee qualifying us to operate there and recognizing our Virginia incorporation.

Q. Of course, Tennessee Rural Electrification Cooperative law, I believe, allows foreign cooperatives to come into Tennessee without filing charter and all of that stuff.

A. I couldn't answer that.

Q. Just don't know?

A. I don't know.

Mr. Cridlin: Here is the charter, they brought you a copy of the thing, from the Commission of Virginia.

Mr. Rowntree: That's just the same as the other one.

Mr. Cridlin: Same as the other except this has the original certificates.

By Mr. Rowntree:

Q. In what counties in Tennessee does Powell Valley Electric Cooperative serve customers?

A. Hawkins County, Hancock County, Union, Claiborne, and——

Mr. Pedersen: Go over those again, Ralph.

[fol. 111] The Witness: Hawkins, Hancock, Grainer, Union, Claiborne, is that five?

Mr. Cridlin: That's right.

By Mr. Rowntree:

Q. Now were you serving all of those counties in 1957, July 1st?

A. Yes, sir.

Q. Did all of your power to those counties comes out of the substation in the vicinity of Tazewell there?

A. No, sir, part of it comes from Fitts Gap substation.

Q. What county?

A. And it's located in Hancock County.

Q. To what counties did the power from the Fitts Gap substation go in Tennessee?

A. Mainly into Hancock and Hawkins. Some of it goes into Claiborne County.

Q. Could you estimate the proportion of the power that came out of the Tazewell substation into the various counties? Could you estimate roughly what percentage of the power was drawn by each of the counties in Tennessee out of that substation?

A. Well, we could estimate it, but we'd have to go to the records and get the figures in order to do it.

Q. Did the greatest proportion of it go to Claiborne [fol. 112] County?

A. Out of the Tazewell substation?

Q. Yes.

A. Yes, sir, I think so. I don't think there would be any question about that.

Q. Could you estimate the percentage of the power out of that substation that went into counties other than Claiborne?

A. Not without going to the records.

Q. I wonder if you would file as Exhibit 2 your best estimate as to the percentage of power that did go to other counties out of the Tazewell substation other than to Claiborne County at the time—well, say in 1957.

A. Let's get it down exactly what you want.

Mr. McCarthy: Is it possible to make a meaningful estimate of that kind?

Mr. Cridlin: You want the per cent of power that went to other counties other than Claiborne from the Tazewell substation?

Mr. Rowntree: In 1957. Your best estimate.

Mr. Cridlin: I don't know whether we could—frankly I don't know enough about the intricate operation to say, but I don't see how in the world we could supply that.

Mr. Pedersen: It's not proper discovery anyway, I don't [fol. 113] think.

Mr. Cridlin: It would be at best an educated guess, and I don't see where in discovery it would be——

Mr. Rowntree: Is it your position that the amount of power supplied by Powell Valley in Claiborne County is not material to the case?

Mr. Cridlin: By Powell Valley?

Mr. Pedersen: That isn't what you are asking, is it?

Mr. Rowntree: No, we are trying to get a basis of checking any figures that are prepared about that.

Mr. McCarthy: The amount of power supplied by Powell Valley in Claiborne County, I would think was very material to the case, but I don't quite see how you get out, get at that by guessing as to which of two sources power came from.

Mr. Rowntree: Well, let me ask this question.

By Mr. Rowntree:

Q. Mr. Miner, what proportion of the power to Claiborne County came out of the substation at Tazewell in 1957?

A. Well, I don't think I could answer that question.

Mr. McCarthy: Excuse me. Do you mean what proportion of the total power in the county came from Powell Valley, or what proportion of Powell Valley's power came [fol. 114] out of that substation?

Mr. Rowntree: The latter.

Mr. McCarthy: Well, that's the same thing.

The Witness: Let me see if I can understand the question. You are asking what per cent of the power that we distributed in Claiborne County came from the Tazewell substation.

By Mr. Rowntree:

Q. That's right.

A. I couldn't—I just couldn't answer that.

Q. What other source did it come from besides the Tazewell substation?

A. Well, as I said a while ago, there's a little line or two that goes down into Claiborne County out of the Fitts Gap. I don't know how many customers are attached to it, and I certainly couldn't tell you what it was like in 1957 right here and now.

Mr. Cridlin: Let's go off the record.

(Discussion off the record.)

Mr. Cridlin: Could you go to the record, do you think and come up with an educated guess, if you want to call it that?

The Witness: I think we could.

Mr. Cridlin: As to the answer to this question here?

[fol. 115] The Witness: I think we could.

Mr. Rowntree: And would you file this information as Exhibit 2, recognizing that it is an educated guess?

Mr. Cridlin: I think so, for what it's worth, I think we can do that. If we understand the question right now. You want the best estimate as to the per cent of power that did go to other counties other than Claiborne from the Tazewell substation in 1957?

Mr. Ardery: July 1, 1957.

Mr. Rowntree: July 1, 1957.

Mr. Ardery: That depends on whether you are talking about demand or energy. You are talking about kilowatt——

Mr. Cridlin: KWH.

Mr. Ardery: KWH for 1957.

Mr. Cridlin: Do you understand that now?

The Witness: What I think he means is there is a hundred per cent that went out to Claiborne and other counties, and he wants to know what per cent went to Claiborne out of that substation.

Mr. Rowntree: Yes, as I understand Powell Valley's contentions, they contend that the amount of power or service being rendered by Powell Valley in Claiborne County has some materiality in the lawsuit, and what we want to do is [fol. 116] provide ourselves with a basis for checking any computations that are rendered in the case by Powell Valley with respect to that contention.

Mr. Cridlin: I see.

Mr. Rowntree: And this is our purpose in seeking this information.

(The computation referred to, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 2, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now as I understand it, there's a couple of small lines that come out of the other substation you mentioned in Hawkins County.

A. That's in Hancock County.

Q. Hancock County, that goes into Claiborne.

A. I think so, just from memory. I don't have a map before me, but I think there is one line at least that goes into——

Q. Does this provide a material part of the power supply into Claiborne County by Powell Valley?

A. Well, that depends on what you would call a material part.

Q. What part is it?

[fol. 117] A. If we disconnect that line, we'd have some people on our necks right fast.

Q. Well, could you give us an educated guess as Exhibit 3 of the proportion of the Powell Valley power supplied to Claiborne County in 1957 that was supplied by that other substation?

A. I think so.

Mr. Cridlin: Now that is——

The Witness: That's out of Fitts Gap substation into Claiborne County.

Mr. Cridlin: That's best estimate of power from Fitts Gap——

Mr. Ardery: Going to Claiborne County.

Mr. Cridlin: Going to Claiborne County.

Mr. Rowntree: In 1957.

(The computation referred to, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 3, and filed as exhibit to this deposition.)

By Mr. Rowntree

Q. Now, Mr. Miner, I believe you have already mentioned that the substation at Tazewell drew power from Kentucky Utilities transmission line, is that right?

A. Yes, sir.

Q. Was that under this tri-party agreement of 1952?

[fol. 118] A. Well, I think so.

Q. That was an agreement between Kentucky Utilities, Powell Valley, and TVA?

A. Yes, sir.

Q. Now under your contracts with TVA, do you fix your Powell Valley rates in accordance with rates that are determined by TVA basically?

A. We use the basic TVA rate with an amortization charge.

Q. Have the rates been maintained fairly evenly since 1957, or has there been much change?

A. I don't believe there's been any chance since '57. I'd have to qualify that. To be sure I would have to look. We did have a rate increase somewhere back there, but I think it was prior to that time.

Q. Well, you can supply any information along that line if it's material, I mean if it's a material change.

Could you give us the residential rate?

A. I can get you a copy of it.

Q. All right, sir, I'd like to do that.

Mr. Ardery: This will be Exhibit 3?

Mr. Rowntree: Four. We will mark that as Exhibit No. 4.

(The rates referred to were marked for identification as Exhibit No. 4, and filed as exhibit to this deposition.)

[fol. 119] By Mr. Rowntree:

Q. Now I notice you have a minimum amortization charge of $1.00 on this residential rate, Exhibit 4. Then you apply three cents each on the first fifty kilowatt hours, is that correct?

A. Well, let's clarify that a little bit. Just use the three cents and the two cents, and then go to the minimum, and you can understand it better, I think.

The first fifty, you do add two cents per kilowatt hour, and there's where the minimum amortization comes from.

Q. That makes it a total of $2.50 for the first fifty kilowatt hours?

A. That's correct.

Q. And that is subject to a minimum of $1.00 for any less KWH?

A. Yes.

Q. And then you—on the next 150 kilowatt hours, it's two cents or three dollars in addition to the $2.50 for the—for the first 200 kilowatt hours, there would be a charge of $5.50, is that right?

A. Better take that down to the billing room.

Q. Now with respect to that last question, I notice you do have an additional one cent charge for the first—for the 100 kilowatt hours after the first fifty, so that would make——

[fol. 120] Mr. Ardery: Excuse me, it's 150 kilowatt hours after the first fifty, is it not?

The Witness: No, it's one hundred.

By Mr. Rowntree:

Q. So that would make in that second bracket a total amount in the second bracket of four dollars, is that correct?

A. That would be three dollars energy and one dollar amortization.

Q. Making a total of four dollars?

A. Making a total of four dollars.

Q. So for the first two hundred kilowatt hours, you would have a total charge of the four dollars plus the two fifty for the first bracket?

A. Yes, sir.

Q. And makes it $6.50 for the first 200 kilowatt hours?

A. Well, that's what I got.

Q. All right, sir. Now is your amortization charge which you add to the TVA rate this two cents per kilowatt hour for the first fifty KWH and the one cent per kilowatt hour for the next 100 KWH?

A. That's the amortization charge.

Q. And that's in addition to the consideration that there [fol. 121] is a one dollar minimum charge?

A. Now let's back up a minute.

Q. I don't mean that this is in addition to that amount, but that is an additional consideration on the amortization that you have an overriding one dollar minimum?

A. Yes, sir.

Q. And there's no other amortization charge besides those?

A. No, this is it.

Q. Now what is this amortization charge for? What does it amortize?

A. Well, it's called amortization, and in some instances contributions for debt service and others, and it's used actually, as I see it, it's used to supplement your operating revenue. If your revenue from the standard rate isn't sufficient to operate the cooperative, then this money is used to provide additional revenue. It can be used for debt service, debt retirement, things of that nature.

Q. Can the cooperative operate without losing money at the TVA rate?

A. No, sir, not at this standard rate, that's the reason the amortization charge has been added.

Q. Has the cooperative created any surplus by reason of the application of the amortization rate?

A. Well, again that depends on what you consider a sur-
[fol. 122] plus. I don't think our cooperative has one.

Q. Do you have your latest financial statement available?

A. We don't have the latest one. The officers just finished——

Mr. Cridlin: It hasn't been compiled yet.

The Witness: It hasn't been put in form yet.

By Mr. Rowntree:

Q. Could we look at the last one that is available?

A. As far as I'm concerned.

(The financial statement was handed to counsel.)

Q. Mr. Miner, I observe from this balance sheet, or this financial report by Peat, Warwick, Mitchell and Company for the year ending June 30, 1963, for Powell Valley Electric Cooperative, a statement of accumulated deficit, balance at the end of the year $1,418,037.54. Is that the result of applying only the TVA rate in determining income?

A. Yes, sir, that's operating revenues.

Q. And the amortization charge we have talked about would be not taken into consideration in determining this accumulated deficit?

A. That's right. That's correct.

Q. Is there any portion of this audit report that covers the application of the amortization charge?

[fol. 123] A. There is if we can find it.

It's in here somewhere, I'm sure, but I'm like Clyde, it takes a long time to find it.

Here it is: Members' contributions to debt service.

Q. You carry that on the liability side of the balance sheet, Exhibit A, as a cumulative figure from past years, and then you, in the 1963 figure on that page, you accumulate past years plus the current year, 1963, is that correct?

A. Well, I would assume that this includes the 1963.

Q. Yes, sir.

A. This one here.

Q. Yes, sir. It's larger than the '62 figure showing an increase in '63?

A. That's right.

Mr. McCarthy: Would you identify this one here so we know what you are pointing to?

Mr. Rowntree: This is under the liability item of the balance sheet of Powell Valley Electric Cooperative for the year ended June 30, 1963, showing member and patron equities, membership fees are $63,775.00; members contributions to debt service——

By Mr. Rowntree:

[fol. 124] Q. And this is the amortization charge we've talked about?

A. Yes, sir.

Q. $1,713,433.50.

Then there are other capital contributions of $3,173,29, making member and patron equities total $1,780,381.79.

Now, Mr. Miner, that is a liability figure on the balance sheet which would be deducted from asset figures to arrive at the accumulated deficit, is that correct?

A. Well, you will note that the deficit is also on the liability side, and they deduct it right here at this point.

Q. And the accumulated deficit which we have talked about before, $1,418,037.54, deducted from the member and patron equities of $1,780,381.79 leaves a net for membership and patronage equity of $361,344.25, right?

A. Yes, sir.

Q. I also observe that you have on the balance sheet current assets of cash, general, $117,814.26 at the end of the

year, June 30, 1963, and cash in construction fund of $2,877.08.

Do you generally carry a substantial cash account in the neighborhood of that figure?

A. No, sir, that was rather large, I'd say.

Q. The year before, you had $74,587.13 in the general [fol. 125] cash account. Was that more representative?

A. That's nearer to the usual amount.

Q. We included in Mr. House's deposition the contracts with respect to the tri-party agreement, and do you recall, Mr. Miner, that there was an agreement between Powell Valley and Kentucky Utilities that was entered into approximately that same time concerning the service to customers by one of the two of the other——

A. In addition to the tri-party agreement?

Q. Yes, sir.

A. I'm not so sure that I did.

Q. I believe it was Mr. House's exhibit 6 which we filed the agreements. Do you recall the agreement letter entered into in 1952 concerning the service to customers by either Kentucky Utilities or by Powell Valley which customers were being served by the other?

A. Well, I'm not too sure that I recall it.

Q. Well, you do remember, do you not, that there was an agreement in 1952 to the effect that Kentucky Utilities would not serve a customer of Powell Valley, and Powell Valley would not serve a customer of Kentucky Utilities?

A. Yes, sir, I think I recall that.

Q. Mr. Miner, do you recall that there were certain disputes that arose after 1952 and before the 1958 agreement between Powell Valley and Kentucky Utilities concerning [fol. 126] who would serve new customers in the Tazewell-New Tazewell area?

A. Well, I know by seeing some of the correspondence and things that there were conflicts.

Q. And do you recall this House Exhibit 5 in which there are listed a number of different disputes that arose and the arguments of KU and the arguments of Powell Valley with respect to those disputes?

A. I recall having seen this, yes, sir.

Q. And do you recall that there was developed a territorial agreement to more broadly cover the situation to take

care of such disputes as that, which agreement was entered into in 1958?

A. Well, again I've seen the agreement.

Q. That was when you were superintendent, I take it, and not general manager?

A. At the time this '58 letter was written?

Q. Yes, sir.

A. I suppose I was a service man at that time.

Q. You weren't general manager?

A. No.

Mr. Cridlin: That's the thing about these things, John. He had no administrative responsibility at all back then.

By Mr. Rowntree:

[fol. 127] Q. Do you recall that there was such an agreement entered into?

A. I'll go back to my other answer; I saw the letter.

Q. All right, sir. And do you recall that maps were prepared under that territorial agreement of 1958 to depict the territory of Powell Valley and the territory of Kentucky Utilities in the Tazewell-New Tazewell area?

A. Well, I didn't have anything to do with preparing any maps.

Q. Do you recall that there were maps prepared?

A. I had a general knowledge that they were being—there was some work being done in this direction.

Q. And do you recall that questions that arose with respect to new customers from that point on were resolved between the parties, Kentucky Utilities and Powell Valley under the agreement and under the maps that were developed?

A. Well, since I didn't handle any of the——

Mr. Cridlin: Just a second. This question seems to me like you presuppose that there was an agreement.

Mr. Rowntree: Of 1958?

Mr. Cridlin: You're talking about under the maps here. I thought you were talking about that.

Mr. Rowntree: Well, what I'm referring to are the maps [fol. 128] exhibited 1 and 2 to Mr. Rowe. Does that help clarify the question for you?

Mr. Cridlin: Do you contend there was any agreement with reference to those maps? That's my objection that you are asking if he recalls that agreement or that if disputes were resolved under the agreement when in fact there was no agreement.

Mr. Rowntree: Under the agreement of the letter of 1958 and also the maps.

Mr. Cridlin: Oh, I see what you mean. You connect the maps to the letter agreement of '58. Is that what you are doing?

Mr. Rowntree: Well, I haven't made any attempt to connect them in that question.

Mr. Cridlin: Well, I just didn't understand the term "agreement". That's all right. Go ahead.

Mr. Pedersen: We object on the ground it assumes that those maps were agreed upon. There's no testimony here to that effect. That's counsel's assumption.

Mr. Rowntree: Well, I haven't attempted to characterize the legal effect of the maps. I'm trying to get at the practical use of the maps and the letter agreement and the use of those in connection with questions that arose with respect to servicing new customers.

[fol. 129] By Mr. Rowntree:

Q. Now can you answer the question?

A. Well, I had very little to do with this service area.

Q. So you had——

A. Until the time I became manager.

Q. So you had nothing to do with the disposition of such questions?

A. Ordinarily I wouldn't have. If there was any case that I did, I don't recall.

Mr. Rowntree: All right, sir.

Mr. McCarthy: May I ask counsel a question? Do you contend that those maps were ever approved by the Powell Valley Board?

Mr. Rowntree: I don't know whether they were or not. I can't make such a contention, because I don't know whether they were or not. We had the testimony yesterday, and that's all we know about it from the side of Powell Valley. That's the testimony of Mr. Rowe.

Mr. Pedersen: Mayle that's the question that ought to be asked before you get into all the rest of it.

By Mr. Rowntree:

Q. Now when was your first contact with respect to the [fol. 130] dispute in this case; the servicing of customers of KU in Tazewell and New Tazewell? Was it in connection with the April 12, 1962, meeting?

A. Read that back.

(The last question was read by the reporter.)

A. Well, every time you get out of a car in Tazewell or any time you are there, you are contacted by somebody about being served by—somebody raises cain because he didn't get served by Powell Valley. As far as contacts, informal contacts are concerned, every time that you are in the area, you are contacted.

Q. Well, this was back when you were superintendent of the Jonesville District, Jonesville area. I take it that Mr. Berry was general manager in 1962, was that right?

A. Yes, sir, up until his death in '62.

Q. Did he ask you to attend a meeting concerning the Tazewell-New Tazewell situation along about April, 1962?

A. Yes, he did.

Q. And did you attend that meeting at the TVA office in Knoxville—no, at Cedar Grove in Claiborne County?

A. Yes.

Q. Mr. Berry died the second night after that, I believe, is that correct?

A. I believe he died the following night after that.

[fol. 131] Q. And you became general manager and have served as general manager since that time?

A. Well, I was appointed coordinator for a couple of weeks or something like that, and then made manager.

Q. You were the administrative head from that time on?

A. From that time on, yes, sir.

Q. Now I show you memorandum of that meeting of April 12, 1962. Do you recognize that as being notes with respect to that meeting?

A. Yes, sir.

Q. Who prepared these notes?

A. I think these were prepared partly by Mr. Berry and partly by myself.

Q. Can you recognize where his stopped and yours began?

A. Well, he had prepared this list of names, and as I recall had made some notes on some plain pieces of paper, and I transcribed a thing or two that he had and some notes that I had made over to here.

Q. Do these notes conform to your recollection with respect to what happened at the meeting?

A. Yes, sir.

Mr. Rowntree: I'd like to file that as Exhibit No. 5.

[fol. 132] (The document referred to was marked for identification as Exhibit No. 5, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now I observe in Exhibit 5 this language, Mr. Miner, quote:

> "Apparently a territorial agreement between KU Company and PVEC is a big factor in this issue. This expires in January, 1963."

Do you recall that as being a big factor in that meeting?

A. Well, I recall hearing that discussed in that meeting.

Q. Who was discussing it mainly?

A. Well, a good many of the people talked about this thing. I don't know how much they knew about it, but they——

Q. Well, I mean people at the meeting, who was talking about it, who brought it up?

A. The members of the Chamber of Commerce apparently talked about this some and I'm not sure—it's been a long time ago, and I just made this—transcribed this or made this note. I'm not sure who talked about it at that time.

Q. The Exhibit 5 also states on the second page, quote:

[fol. 133] "TVA statement—it is not feasible to operate a system of this size."

I suppose the TVA representatives were talking about a system in Tazewell and New Tazewell.

A. Yes, sir.

Q. As a municipal system.

A. I think so.

Q. And the councilmen from the municipalities who were present in that second paragraph on that page stated that they would rather have PVEC or some other agency take over and own the system eventually.

Is that what they expressed there?

A. Well, at least that's what the note said; I suppose it was.

Q. And there is a note at the bottom, at the end of this exhibit 5, quote:

> "REA will not finance duplicate system but will loan money to buy existing one if population under fifteen hundred."

Was that expressed at the meeting?

A. Well, again it must have been. I don't recall the statement, the words, now except that the note has been made.

Q. Then the third paragraph on that page states, quote:

> [fol. 134] "Towns may buy system, get PVEC to operate for a time then sell."

Was that a proposal made at the meeting?

A. Well, I would think that this wouldn't be a proposal. It looks like a statement of fact to me.

Q. Would you say that that was discussed at the meeting?

A. I would assume it was.

Q. And when that statement says "then sell", quoting, does that mean sell to PVEC?

A. No, sir, as I recall that part, they could sell it to anybody they wanted to.

Q. All right, sir. Then the statement in the fourth paragraph on that page states, quote:

> "TVA instructions: councils to approach both KU and PVEC—find out KU's position on selling—PVEC on buying."

Were those the TVA instructions at that meeting?

A. Well, I'd say that wasn't a very good word, "instructions". I think it was decided at that meeting that these people should appoint a committee to approach KU and Powell Valley.

Q. Of course KU was not at the meeting, was it?

A. Not that I knew of:

Q. But Powell Valley was?

[fol. 135] A. Yes, sir.

Q. And is it not true that Powell Valley expressed at the meeting the idea that they would buy the system?

A. I don't believe so. I think Berry made some statement about operating, but I don't think he ever made any commitment of buying.

Q. But it was discussed there with no final sort of a commitment or understanding about the buying part?

A. Yes, this was discussed.

Q. Now do you recall that you prepared some notes or memorandum concerning Tazewell and New Tazewell power situation giving a summary of your knowledge of that situation, number 55?

A. Now what was the question?

Q. Do you recall preparing these notes which I show you?

A. Yes, sir.

Q. On the second page of that at the top, it states, quote; and this concerns the meeting of April 12, 1962, does it not?

A. Did you ask a question, I'm sorry.

Q. Yes. Does this language in this first and second full paragraphs on the second page pertain to the April 12, 1962, meeting?

A. Yes, they do. I didn't realize you had asked a question.

[fol. 136] Q. Quoting:

> "They were told by TVA that a system of this size was not feasible to operate on its own. They replied they did not intend to operate it if they could lease it to a TVA distributor. They asked Mr. Berry if the cooperative could buy the system. He replied that no loan funds would be available to duplicate the system, but it might be possible to borrow money to buy it if it were for sale."

Is that your recollection of statements made at the meeting?

A. Well, I don't know where I got that particular note, whether this came from some of the notes we had there or not. This was—these notes do refer to that same meeting.

Q. Isn't that your recollection of what happened at the meeting? Wasn't that the purpose of this memorandum?

A. Yes, sir.

Q. And when it says "they" there, that's talking about the representatives of the two towns?

A. Representatives of the Chamber of Commerce I think actually, which contained people of both towns.

Q. All right, sir.

Mr. Pedersen: Are you filing that as an exhibit?

Mr. Rowntree: No.

By Mr. Rowntree:

[fol. 137] Q. Do you recall that the 1958 territorial agreement between Powell Valley and Kentucky Utilities which we have mentioned before was cancelled effective January, 1963?

A. Yes, sir.

Q. And the possibility of terminating this agreement was discussed, was it not, at the April 12, 1962, meeting?

A. Yes, sir.

Q. And then shortly after the cancellation letter, did not the representatives of the towns seek another meeting between Powell Valley and TVA and the two towns, referring to 64 of your papers?

A. Well, I'd answer that question that the Chamber of Commerce did request a meeting.

Q. I show you letter of October 23, 1962, from Mr. William R. Stanifer to you. Do you recall receiving that letter asking for a meeting on November 13?

A. Yes, sir.

Mr. Rowntree: File that as Exhibit 6.

(The letter referred to was marked for identification as Exhibit No. 6, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. The meeting was not held on November 13, 1962, as requested, was it?

A. No, sir, as I recall, it wasn't.

[fol. 138] Q. Did you go to Washington and talk to some one concerning this matter a short time after receiving that letter?

A. Yes, sir, I did.

Q. Who did you talk to?

A. I talked to William Calloway and some other people in REA.

Q. Mr. Calloway was a representative of REA?

A. Yes, sir.

Q. What was his position?

A. He was an area director, I believe.

Q. Covering this area?

A. Northeast area.

Q. Northeast area of the United States of——

A. Of the United States.

Q. Would he have anything to do with this area?

A. I'm not sure how that's set up. He is the director of this area of REA.

Q. This area falls in his territory?

A. This falls in his territory.

Q. Do you have your number 67 available now?

A. We don't have 67.

Mr. Cridlin: Who has those that I held out. I want to get them for him.

The Witness: You do.

[fol. 139] Mr. Cridlin: I have them?

The Witness: Yes.

Mr. Cridlin: I may have to send to the office after the thing.

Mr. Rowntree: Could we take a short break if you don't have one?

Mr. Cridlin: Yes.

(Whereupon, a short recess was taken.)

Mr. Rowntree: This is notes of a meeting held November 6, 1962, Mr. Callaway's office in Washington. Mr. Callaway. Mr. Stokely, and Mr. Black of the REA, Washington office.

being present; and legal counsel, REA, Washington, present; and Mr. Miner.

"The purpose of this meeting was to discuss the possible acquisition of power facilities in Tazewell and New Tazewell, Tennessee. The people there have expressed an interest in lower cost power and have contacted the cooperative relative to providing this power. During the course of subsequent discussion, it was decided the cooperative could not borrow the money from REA to acquire these facilities, however, it might be possible to finance all or part of it from general funds. An alternate method was discussed, that of the cooperative operating and maintaining the system after the [fol. 140] towns had purchased it from KU. Preferably, under this plan, the cooperative would retire the revenue bonds issued by the towns as they came due, spend whatever was necessary out of general funds to modify and improve the system; and when the bonds were retired, would own the system. (Should be careful not to let the towns own it too long).

"Most of the discussion centered around this method, (bonds and so forth) and the following steps were outlined as a possibility for the two towns to consider."

I'd like to file that as Exhibit 7.

(The document referred to was marked for identification as Exhibit No. 7, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Then, Mr. Miner, you recall that after you got back, a meeting was arranged for Powell Valley to meet with TVA on November 15, do you recall that?

A. Yes, sir.

Q. Do you recognize that as being notes of that meeting of November 15, with the TVA?

A. Yes, sir.

Mr. Rowntree: I'd like to file that as Exhibit No. 8.

[fol. 141] (The document referred to was marked for identification as Exhibit No. 8, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now the towns of Tazewell and New Tazewell did not have representatives at this meeting, did they?

A. No, sir.

Q. And what is the purpose of that meeting as expressed in that memorandum?

A. To try to determine what course the people of these towns should follow, or in what way we could help them in securing lower cost power.

Q. In that memorandum, it does set forth two plans, does it not, that were discussed at this meeting?

A. Yes, sir.

Q. And did you not express concern that Kentucky Utilities might pull out under the tri-party agreement and did you not ask TVA for a commitment of TVA power supply in that eventuality?

A. Well, I asked TVA sometime or other for a firm commitment for power in this situation. Whether or not we discussed this—well, that's what it says, in the event KU cancels tri-party agreement, in the notes.

Q. And under that first plan that you were discussing there, that contemplated the operation, acquisition of the [fol. 142] system by Powell Valley, is that not true?

A. Yes, sir.

Q. And is it not true that the idea was expressed in that meeting that Powell Valley would approach Kentucky Utilities to buy the Kentucky Utilities system in the area with the threat that a duplicate system would be constructed if they did not sell?

A. Yes, sir, apparently that was one of the things that was considered.

Q. And was that not this sort of plan or procedure rejected by REA preceding the meeting that you had had in Washington a few days before?

A. Well, I don't think this approach was discussed with REA at all.

Q. But the REA had certainly turned down any idea that a duplicate system would be constructed, had they not?

A. Well, REA had made it clear that no loan funds would be made available for anything in this area.

Q. Well, it's true that Powell Valley would need loan

funds if they buy the Kentucky Utilities system there in the area, wouldn't it?

A. They would need loan funds, not necessarily REA loan funds.

Q. Well, the REA would have to approve any such acquisition, would it not?

[fol. 143] A. Well, you're getting into a legal field there; as far as I know, they wouldn't.

Q. Referring to Exhibit 1, Article 2, Section 10 of the trust deed executed by Powell Valley to secure loans from the REA, do you recall that that section does require approval in writing of any acquisitions to the system, approval by REA or by the holder of the notes which were issued originally to REA?

Mr. Cridlin: I think that's asking him for a legal conclusion interpreting a trust agreement, and I don't believe it's proper for him to answer that question.

Mr. Rowntree: Well, we simply make reference to that provision at this point.

By Mr. Rowntree:

Q. Now at this November 15, meeting between Powell Valley and TVA under your second plan there, did that contemplate acquisition of the system by the towns?

A. Yes.

Q. And did you discuss what steps the towns should take in connection with that second plan?

A. Yes, we did.

Q. And did it include making—having an appraisal made of the properties of KU in the area?

A. Yes, sir, that was one of the first things apparently.

[fol. 144] Q. Did it include the issuance of bonds by the towns to acquire the system?

A. Well, this was one of the things that could be done.

Q. And was it discussed that Powell Valley Electric would take over the system by lease and operate it?

A. Yes, sir.

Q. And the third phase of that second plan that was discussed was that Powell Valley would make necessary replacements and improvements and retire the bonds, also

might buy a major part of the bonds initially, is that correct?

A. That was discussed, yes, sir.

Q. And was it contemplated that Powell Valley and others would go to the Tennessee Public Service Commission concerning this matter?

A. This was discussed.

Q. And was it discussed that the Commission would be told that ninety-five per cent or more of the people of the towns wanted Powell Valley power?

A. This ninety-five per cent figure, I think, came from the representatives of the Chamber of Commerce or somebody that had met with us at one time or another.

Q. Do you know where that figure came from or who reached such a figure as that?

[fol. 145] A. No, sir, I don't.

Q. You don't know how such a figure was arrived at, the ninety-five per cent?

A. No.

Q. Then the last paragraph of 68, this occurs:

> "The two towns should adopt a resolution as follows: They want cheaper power—The Cooperative has this cheaper power—They demand that the Cooperative serve them either by buying out K. U. or duplicating their system."

Was that discussed at this meeting?

A. Well, that goes back to plan one, I think.

Q. Yes, sir, it does say after this "(This would be a part of Plan #1)."

Was that discussed?

A. Apparently it was.

Q. And I notice that there's no reference to referendum or determining the will of the people in there. Was that not an important consideration as far as TVA and Powell Valley were concerned?

A. Well of course it is, but we felt that we had a—had had contacts from people who should be in a position to know what the will of the people was in this situation from time to time. I think possibly that's where this ninety-five

per cent figure came from was from somebody who had [fol. 146] talked to us at one time or another.

Q. Of course up to this time, you had been talking to members of the Chamber of Commerce, had you not? Had any official action been taken by the town, governing bodies, at this point?

A. None that I know of.

Q. Now this Exhibit 8, notes on meeting of November 15 in the paragraph after the list of those present states that:

> "It was decided by this group that the Board of the Cooperative should decide which of the two plans they would follow so that when we meet with representatives of the Towns we can tell them exactly which way we think they should go."

Did the Board of the Cooperative consider this question after that meeting of November 15?

A. Yes, sir, they did.

Q. Was there any official action taken by the board?

A. I think they made recommendations.

Q. Do you have any minutes on that?

A. I'm sure that we do.

Q. Could we look at them?

Mr. Cridlin: What meeting?

Mr. Rowntree: This would be between November 15, 1962, [fol. 147] and November 27, 1962.

Mr. Cridlin: Get them and let me see what they are.

(The minutes were obtained.)

Mr. Cridlin: I think you will find paragraph 7 refers to——

Mr. Rowntree: Just read this in.

Counsel has provided minutes of meeting, Board of Directors of Powell Valley Electric Cooperative for the month of November, 1962, held November 16, 1962, paragraph 7, quoting:

> "The manager then reported on meetings with REA officials in Washington in regard to the request by Tazewell and New Tazewell, Tennessee, that we help them secure low-cost power. Manager Miner and Attorney

Cridlin also reported on a meeting held with TVA in regard to the same request. This was fully discussed, and the Board of Directors indicated they were sympathetic with the cause of the people in this area and felt we should provide any help we could in the way of advice and arranging the necessary meetings."

Thank you, sir.

By Mr. Rowntree:

Q. Do you recall, Mr. Miner, that a meeting was held between Powell Valley and TVA and representatives of the [fol. 148] towns on November 27, 1962, referring to 93?

A. Yes, sir.

Q. I show you notes of such a meeting. Do you recognize those as being your notes with respect to what happened at that meeting?

Mr. Pedersen: This is what meeting again?

Mr. Rowntree: November 27, 1962.

The Witness: Yes, sir.

By Mr. Rowntree:

Q. I notice that that date written out there was 1963, but you think this was a mistake?

A. This was an error; it should have been '62.

Mr. Rowntree: I'd like to file that as Exhibit No. 9.

(The document referred to was marked for identification as Exhibit No. 9, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Did you express at this meeting the concept that Powell Valley Board decided that it would be better for the towns to take over the system, or do you recall, rather than having Powell Valley take over?

A. What was the question again?

Mr. Rowntree: Read the question.

(The last question was read by the reporter.)

[fol. 149] The Witness: Well, I don't recall, and I don't see it in the notes here. It did say in this paragraph at the top of the second page that we informed them we would be willing to operate this system.

By Mr. Rowntree:

Q. Yes. And apparently you did discuss, did you not, the general form of a resolution to be passed by the two towns?

A. Yes, sir, this was discussed.

Q. And included in that would be an appraisal by a competent engineer of the KU property, is that right?

A. Yes, sir.

Q. And it was again expressed here that KU would be approached about selling their facilities and if they were unwilling, KU would be informed that the two towns intended to have low-cost power if it meant duplicating the system. Was that idea expressed?

A. Yes, sir.

Q. Now on the second page there, that second full paragraph, it was—the question was raised as to, if Kentucky Utilities was not required to lower its rates by the Tennessee Public Utilities Commission, and if Powell Valley was asked by a resolution of the towns to duplicate the KU system in the towns, what position would the cooperative take? What that question raised at that meeting?

[fol. 150] A. It apparently was.

Q. Now the next paragraph after that is this, quote:

> "This question has since been asked of REA Officials in Washington and they advise they will let us know what their thinking is in this regard."

Whatever became of that now? Have you received any communication or any——

A. I don't think so.

Q. Then do you recall that a meeting was discussed for December 18th with the appraiser that was selected, Mr. Cottrell?

A. He had a tentative date set for Tuesday, December 18th, here, looks like.

Q. Refer to 94. Now do you recall that you attended that meeting?

A. Yes, sir.

Q. Is this paper I hand you your notes concerning that meeting?

A. Yes, sir.

Mr. Rowntree: File that as Exhibit 10.

(The document referred to was marked for identification as Exhibit No. 10, and filed as an exhibit to this deposition.)

[fol. 151] By Mr. Rowntree:

Q. And there you meet with Mr. Sandefur, the superintendent of Powell Valley in Tazewell and New Tazewell and with Mr. Cottrell and with representatives of the two towns including the two mayors, is that correct?

A. Looks like I had two mayors and a future mayor.

Q. Yes, sir, and that was Mr. Ed Hardin?

A. Right.

Q. Do you recall that the towns, in addition to discussing the appraisal also raised questions with respect to cooperative services including whether or not an amortization charge would be charged by Powell Valley if Powell Valley power was supplied to the towns?

A. There were questions asked about the amortization charge.

Q. Well, referring to page 2 there at the top of the page, is that the answer that you gave?

A. That's right.

Q. Quoting:

> "In regard to the Amortization Charge, they were told that this charge would be eliminated as soon as it could be determined that it would not jeopardize the financial condition of the Cooperative."

A. That's correct.

Q. At that time Powell Valley had no office in Tazewell or New Tazewell, did they, billing office?

[fol. 152] A. No office that could be used for the payment of bills and so forth.

Q. Do they have any such office today?

A. No, sir.

Q. Do you recall that you met with the city council from time to time after that, city councils of Tazewell and New Tazewell?

A. I recall, I believe, that I attended two meetings. I'm not sure that they were—whether they were joint meetings or just what type of group made it up.

Q. Do you recall attending a meeting on the night of May 13, 1963, of the councils of the two towns?

A. Is it all right if I refer to these notes?

Q. Yes, sir, go right ahead. And I believe at that meeting, Mr. Bowers, attorney from the Tennessee Municipal League, was present. Do you recall that?

A. No, sir, I didn't attend the meeting that Mr. Bowers was present in as far as I know. What was that date again?

Q. May 13, 1963. I think that was a special called meeting.

A. I attended a meeting that had this Dr. Puett.

Q. Well, this name Bowers might be in error.

Mr. Pedersen: What are you getting this from?

Mr. Rowntree: I'm getting this from a statement by one [fol. 153] of the councilmen.

The Witness: Bowers was not there when Dr. Puett was there that I remember. I don't have the date.

By Mr. Rowntree:

Q. Was this a night meeting?

A. This was a night meeting that I attended.

Q. Did you attend a meeting the next day?

A. No, sir.

Q. Were you present at the meeting of May 14, 1963, the meeting where the two councils rescinded resolution calling for a referendum on this issue?

A. No, sir, I've never been present at a meeting where they took any official action.

Q. Have you been present at any meetings prior to the time that the—that is have you attended any meetings of the council and left before official action was taken?

Mr. Cridwell: Well, would he be in a position to know whether or not—if he left—official action was taken?

By Mr. Rowntree:

Q. You have attended meetings of official council meetings, that was the question?

A. I have attended at least one meeting where both councils were there, and as far as whether they took any official action after I left, I couldn't answer.

[fol. 154] Q. You don't know whether this was the meeting of May 14, 1963, or the meeting of May 13, 1963?

A. I don't have any date. I have in my notes that I attended a meeting at which Dr. Puett from the University of Tennessee was present and he was representing an organization known as the municipal technical advisory service.

Q. Was that——

Mr. Pedersen: What was his full name?

The Witness: I just have Dr. Puett, P-u-e-t-t, and I could of course be wrong about the spelling of that.

By Mr. Rowntree:

Q. Is that the meeting where the possibility of issuing bonds by the municipalities was discussed by Dr. Puett?

A. They discussed various different things, bonds and different methods that this thing could be done. As I understood it, he was there in an advisory capacity.

Q. And do you recall that shortly after that meeting, the councils cancelled the previous call for a referendum on this question?

A. I read that in the paper, I believe.

Q. A short time after the meeting that you attended?

A. Shortly after this meeting, yes, sir.

Q. Do you recall attending a meeting on February 18, [fol. 155] 1963, a special meeting at night?

A. Well, I have here that I attended a meeting on February the 11th, 1963.

Q. You have no notes on a meeting of February the 18th?

A. No, sir, I don't have.

Q. Did you make any statements at that meeting of February the 11th, and if so, generally what was stated, if you can recall?

A. Well, I'll refer to these notes.

Q. All right, sir.

A. I made statements as follows:

"1. That we had had numerous requests from people in the area to help them obtain TVA power, even to the point of people threatening to sue the cooperative;

"2. That we were willing to help as much as we could, but that they (the towns) would have to take the initiative in any action;

"3. That our cooperative was doing fairly well financially and could continue to do so without the towns;

"4. That we would advise, but do not want to push them into anything—if they were satisfied as things were, then so were we."

Q. Then your recollection is that that was February 11, 1963?

[fol. 156] A. I have that date in these notes. I'm not sure where I got it, but it is the date I have.

Q. Did you attend any council meetings after that meeting, and besides this meeting with Dr. Puett?

A. No, sir, to my recollection, those two are the only meetings that I have attended.

Mr. Cridlin: John, at this point, I think if you have any reference to information that he attended any meetings other than these, if you would call it to his attention, maybe he would recollect it. We are not trying to——

Mr. Rowntree: I think I have called attention to any notes that I have from this councilman.

Mr. Pedersen: Is that one of the documents that you have listed in answer to your interrogatories? I don't see it.

Mr. Rowntree: No, this is a statement by Mr. Mays.

Mr. Pedersen: Would you be willing to give us a copy of that?

Mr. Rowntree: Yes, I will give you a copy of it.

By Mr. Rowntree:

Q. Now do you recall, Mr. Miner, attending a meeting February 12, 1963, between the Powell Valley and repre-[fol. 157] sentatives of Tennessee Rural Electric Cooperative Association in Nashville?

A. Yes, sir.

Q. Are these the notes of that meeting that you prepared?

A. Yes, sir.

Mr. Rowntree: I'd like to file that as Exhibit No. 11.

(The document referred to was marked for identification as Exhibit No. 11, and filed as exhibit to this deposition.)

(Discussion off the record.)

By Mr. Rowntree:

Q. Mr. Miner, is it possible that this council meeting that you recollected going to on February 11th, could have been on February 18th?

A. Yes, sir, it is possible.

Q. And therefore this meeting with Tennessee Rural Electric Cooperative Association noted in Exhibit 11 could have been prior to that council meeting?

A. Could have been prior to that council meeting.

Q. Who called this meeting? How did it come about?

A. This meeting came about through my inquiring of Jake Hundley about the tax-exempt status from sales tax of [fol. 158] a cooperative in Tennessee by telephone.

Q. Did you——

A. As I recall it.

Q. Did you get advice that the cooperative was exempt?

A. Yes, sir, Jake agreed to go by the place down there and talk to the people for us, I think.

Q. Was this a sales tax question?

A. Yes, sir, on items that the cooperative buys.

Q. And you did obtain your exemption?

A. Yes, sir.

Q. And was the Tazewell-New Tazewell matter discussed at that meeting?

A. Yes, it was.

Q. Do you recall that at this council meeting of February 18, 1963, that the councils decided to go to the Tennessee Public Service Commission about a reduction in the Kentucky Utilities rate?

A. I recall that being discussed.

Q. Were you present when the—in a later council meeting when the answer of the Tennessee Public Service Commission was received and discussed by the council?

A. I don't believe so.

Q. Do you know what action the Commission took for that resolution of the two towns?

[fol. 159] A. No, sir, I can't say that I do.

Q. Referring to Mr. House's Exhibit No. 21, do you recall seeing a rate, comparative rate schedule, distributed by Kentucky Utilities during the course of this problem there in Tazewell and New Tazewell, particularly during the times that the petitions were being circulated?

A. Well, I saw several different things circulated by KU. I'm not sure what you are referring to.

Q. Well, that really is not House's 21; it's TVA's number 52. Do you recall seeing that sheet circulated?

A. Yes, sir.

Q. Did you make any protest as to the accuracy of that chart there, or did you even study it at the time?

A. Well, I saw it, and I'm sure I protested it under my breath. Whether I did out loud, I don't know.

Q. Is there something in error on that chart?

A. I really don't know. The thing I didn't particularly care about it was this adding in the REA gross billing with stamp and money order and all that stuff. I don't know how KU gets their bills in, but I assume that people mail their bills in.

Q. Well, KU has an office there in Tazewell and New Tazewell, does it not, where bills can be paid?

A. Yes, sir. Wouldn't cost over a quarter's worth of gas, I guess, to go out there and pay a bill.

[fol. 160] Q. Or pay it when they go by there?

A. Yes, sir.

Q. All right, sir. Did you attend a meeting June the 14th, 1963, with TVA representatives?

A. June the 14th?

Q. 1963.

A. The date doesn't mean anything to me. Do you have anything there?

Q. All right, sir. I refer to Mr. House's exhibit 21, which is TVA's number 55. Do you recall getting that letter and meeting in accordance with that time?

A. Well, I'm still not sure that we had this meeting. I suppose we did.

Q. Do you recall that in June, 1963, the matter was discussed between you and TVA as to a commitment by TVA of TVA power for Tazewell and New Tazewell?

A. Well, of course I recall that being discussed.

Q. Referring to Mr. House's Exhibit No. 23, the communication between Mr. House and Mr. Button, the last paragraph concerning a letter from you requesting that TVA write the cooperative a letter regarding power supply, Mr. House states that—states to Mr. Button:

> "You will recall we agreed to sending such a letter in our meeting with Messrs. Miner and Cridlin in my office on June 14, 1963."

[fol. 161] Does that ring a bell with you about such a meeting?

A. Yes, sir.

Q. Was it agreed at that meeting on June 14, 1963, that TVA would send a letter committing TVA to supply power to Tazewell and New Tazewell?

A. I'm sure TVA agreed at that meeting that they could supply the power, whatever our needs would be in this area.

Q. Now also in connection with Mr. House's Exhibit 23, do you recall receiving the letter of August 14 to you from Mr. Hardin, that's August 14, 1963?

A. Yes, sir.

Q. And do you recall sending the letter of August 26, 1963, to Mr. House, also contained in that exhibit?

A. Yes, sir.

Q. Now who prepared this communication here from you to Mr. House?

A. I did.

Q. Do you know who prepared this communication from Mr. Hardin to you?

A. Well, I'm not sure that I do.

Q. Now do you recall that another meeting with TVA was scheduled after this exchange of letters?

A. I recall that there were other meetings. But that's [fol. 162] a long time ago.

Q. Do you recall receiving the letter of August 30, 1963, from Mr. House to you scheduling a meeting with Mr. Ardery and yourself for September 5, 1963?

A. Yes, sir.

Q. Then do you recall that another series of letters were exchanged concerning the commitment for power after that meeting of September 5?

[fol. 159] A. No, sir, I can't say that I do.

Q. Referring to Mr. House's Exhibit No. 21, do you recall seeing a rate, comparative rate schedule, distributed by Kentucky Utilities during the course of this problem there in Tazewell and New Tazewell, particularly during the times that the petitions were being circulated?

A. Well, I saw several different things circulated by KU. I'm not sure what you are referring to.

Q. Well, that really is not House's 21; it's TVA's number 52. Do you recall seeing that sheet circulated?

A. Yes, sir.

Q. Did you make any protest as to the accuracy of that chart there, or did you even study it at the time?

A. Well, I saw it, and I'm sure I protested it under my breath. Whether I did out loud, I don't know.

Q. Is there something in error on that chart?

A. I really don't know. The thing I didn't particularly care about it was this adding in the REA gross billing with stamp and money order and all that stuff. I don't know how KU gets their bills in, but I assume that people mail their bills in.

Q. Well, KU has an office there in Tazewell and New Tazewell, does it not, where bills can be paid?

A. Yes, sir. Wouldn't cost over a quarter's worth of gas, I guess, to go out there and pay a bill.

[fol. 160] Q. Or pay it when they go by there?

A. Yes, sir.

Q. All right, sir. Did you attend a meeting June the 14th, 1963, with TVA representatives?

A. June the 14th?

Q. 1963.

A. The date doesn't mean anything to me. Do you have anything there?

Q. All right, sir. I refer to Mr. House's exhibit 21, which is TVA's number 55. Do you recall getting that letter and meeting in accordance with that time?

A. Well, I'm still not sure that we had this meeting. I suppose we did.

Q. Do you recall that in June, 1963, the matter was discussed between you and TVA as to a commitment by TVA of TVA power for Tazewell and New Tazewell?

A. Well, of course I recall that being discussed.

Q. Referring to Mr. House's Exhibit No. 23, the communication between Mr. House and Mr. Button, the last paragraph concerning a letter from you requesting that TVA write the cooperative a letter regarding power supply, Mr. House states that—states to Mr. Button:

> "You will recall we agreed to sending such a letter in our meeting with Messrs. Miner and Cridlin in my office on June 14, 1963."

[fol. 161] Does that ring a bell with you about such a meeting?

A. Yes, sir.

Q. Was it agreed at that meeting on June 14, 1963, that TVA would send a letter committing TVA to supply power to Tazewell and New Tazewell?

A. I'm sure TVA agreed at that meeting that they could supply the power, whatever our needs would be in this area.

Q. Now also in connection with Mr. House's Exhibit 23, do you recall receiving the letter of August 14 to you from Mr. Hardin, that's August 14, 1963?

A. Yes, sir.

Q. And do you recall sending the letter of August 26, 1963, to Mr. House, also contained in that exhibit?

A. Yes, sir.

Q. Now who prepared this communication here from you to Mr. House?

A. I did.

Q. Do you know who prepared this communication from Mr. Hardin to you?

A. Well, I'm not sure that I do.

Q. Now do you recall that another meeting with TVA was scheduled after this exchange of letters?

A. I recall that there were other meetings. But that's [fol. 162] a long time ago.

Q. Do you recall receiving the letter of August 30, 1963, from Mr. House to you scheduling a meeting with Mr. Ardery and yourself for September 5, 1963?

A. Yes, sir.

Q. Then do you recall that another series of letters were exchanged concerning the commitment for power after that meeting of September 5?

A. Yes, sir.

Q. Referring to Mr. House's Exhibit 26 and 27, and here's Exhibit 27, do you recall those papers being exchanged?

A. Yes, sir.

Q. Now why was there a second go-round on this exchange of commitment papers, do you recall?

A. Yes, sir.

Q. What was it?

A. The first letter to me was from Mayor Hardin and just included the town of Tazewell, as I recall it.

Q. And the second one included both towns?

A. And the second one was from both mayors and included both towns.

Q. Was it contemplated that a joint system be created or was this discussed?

A. Well, it was discussed, I think, from time to time.

[fol. 163] A. Well, I don't know that it has yet.

Q. Well, really there's been no practical step yet taken by the towns to actually establish a municipal system, has there, Mr. Miner? They haven't even resolved the question of whether it will be a joint system.

A. Well, they agreed to do this thing together as a joint venture when they wrote this letter. I remember that being discussed, and as far as their legal side of the picture, I wouldn't know about that.

Q. It was not so much the legal proposition as the practical proposition, isn't it, Mr. Miner? Can you call this a Tazewell system, or can you call it a New Tazewell system, or what would you call it?

A. Well, in our relationship with them, we call them the Tazewell-New Tazewell Power Board.

Q. In other words, you are contemplating a joint system?

A. That's what we——

Q. In other words——

A. We would much rather see it that way, because it would be a lot more trouble to deal with two people, two systems than it would with one.

Q. That would be preferable from your standpoint?

A. Yes, sir.

[fol. 164] Q. But there's been no official action taken by the cities to establish such a system yet?

A. Well, I can't tell you of any action they have taken; I don't know.

Q. You know of no such action?

A. I know of no such action.

Q. Did Kentucky Utilities seek a meeting with the Powell Valley Board along about June of 1963, do you recall that?

A. They had—they did ask for a meeting with the Board.

Q. Do you recall what the purpose of that was?

A. Why I don't think we ever fully determined what the purpose of it was.

Q. Was the Tazewell and New Tazewell situation discussed at that meeting?

A. Yes, it was.

Mr. Pedersen: This was KU had a meeting with Powell Valley, is that right?

Mr. Rowntree: That's correct.

Mr. Cridlin: What was the date of that?

Mr. Rowntree: June 20, 1963, your 78 and 79. I don't think we copied those.

The Witness: You didn't copy those; I have the ones here you copied and it's not one of them.

[fol. 165] By Mr. Rowntree:

Q. Well, maybe you can just recollect the subject of that meeting concerning Tazewell and New Tazewell. Do you recall what was said?

A. Well, I can't recall verbatim, but I got the impression that KU was saying to Powell Valley, unless you boys pull in your horns down there and refuse to help these people, then we are going to Congress or Senate or anywhere else we can and cause you as much trouble as we can. That was about the gist of it.

Q. Was an effort made to settle this question by Kentucky Utilities?

A. Well, they—I think they talked concerning an agreement they would like to sign or get a new agreement.

Q. Territorial agreement?

A. Yes, sir.

Q. Do you recall when the taking of KU customers started in Tazewell and New Tazewell? About October 30th of '63, is that your best recollection?

A. Well, that's—I'd say that's when the people began to disconnect from KU's lines and go over on the city system.

Q. The customers didn't do that themselves though, did they?

Mr. Cridlin: I think that's argumentative.

[fol. 166] He stated the situation.

By Mr. Rowntree:

Q. Well, did the customers make this change in service themselves?

A. Well, I understand in some cases that they actually took the KU meter off of their own home. I wasn't there.

Q. That would be after the meter was disconnected or service to Powell lines was connected?

A. I couldn't answer that. I don't know at what point in there this happened. This is hearsay.

Q. Have you heard that customers went out and disconnected KU service and took the KU meter out before somebody came around to put in the Powell Valley power supply?

A. No. Now wait a minute. Just a minute. The Powell Valley power supply, that's the towns' power supply we're talking about here.

Q. Where did the power come from?

A. Well, that's almost impossible to answer, because KU and TVA are tied together all up and down the country.

Q. Are you saying this was KU power that was being put in in place of KU power?

A. No, you asked where it came from; I can't answer that question, because I don't know.

[fol. 167] Q. Well, was it Powell Valley power at sometime before it got into the house?

A. Yes, sir, it passed over Powell Valley lines.

Q. Did Powell Valley enter into a contract with the cities concerning the furnishing of this power?

A. Well, we wrote them a letter which we agreed to furnish the power, and I'd say the agreement was a verbal agreement with the people.

Q. This letter you referred to which we have already looked at just a while ago in Mr. House's Exhibit 26 or 27, is that correct?

A. Yes, sir.

Mr. Pedersen: What are you asking about 27?
Mr. Rowntree: That letter that he referred to.
The Witness: Yes, sir, that's the letter.

By Mr. Rowntree:

Q. That is the letter of September 24, 1963, from you to Mr. Hardin and to Mr. DeBusk?

A. Yes, sir.

Q. Now you say there was a verbal agreement besides what was contained in that letter?

A. Yes, sir, I think it would be a verbal agreement.

Q. And when was that verbal agreement made?

A. I don't believe I could tell you.

[fol. 168] Q. Did it consist of just one conversation or conversations over a period of time?

A. I'd say it consisted of conversations over a period of time.

Q. And that relates back to these various meetings we are talking about, and things that were said in those meetings, is that right?

A. Yes, sir.

Q. So all of these were incorporated in the understanding of the parties at the time that this power started to be supplied by Powell Valley to the two towns?

A. Yes, sir.

Q. Did you have anything to do with the negotiation of a contract between Irby Construction Company and the towns, one or two contracts?

A. Well, in what respect.

Q. Did you bring the parties together or assist in any way in negotiating that contract or those contracts?

A. Well, I contacted this contractor for the town.

Q. And this contractor was presently, at that time, working for Powell Valley on certain projects?

A. Yes, he was, the company was.

Q. Did you also assist or help in negotiation of procuring engineering services for the two towns with Mr. Cottrell?

[fol. 169] A. Yes, sir, I set up the original meeting. I contacted Mr. Cottrell back in '62, I guess, originally, and he met with these people.

Q. That was concerning an appraisal?

A. That was concerning an appraisal, and he later stopped by and talked to them from time to time as I understand it. I don't have any documented thing on that, but he did stop from time to time and talk to them, I think.

Q. Well, did Powell Valley coordinate with Irby Construction Company in turning on Powell Valley power in to the customers of the towns?

A. Yes, sir.

Q. What was your recollection as to how long Irby Construction Company worked there for the two towns?

A. I really don't know how long he worked.

Q. Would you say it was a week or ten days or what?

A. Somewhere in that neighborhood, I'd say.

Q. Now did Powell Valley do anything about supplying transformers or poles, lines or meters, with respect to this municipal power system?

A. Well, we sold Irby some materials, as far as transformers and things of that nature are concerned. The meters we own now.

Q. What about transformers?

A. The transformers were sold to Irby.

[fol. 170] Q. By Powell Valley?

A. By Powell Valley.

Q. And Irby installed the transformers on this municipal system?

A. Yes, sir.

Q. And the cost of the transformer would be included in Irby's bill to the cities then, I suppose?

A. Yes, sir.

Q. And you billed Irby for the transformers?

A. Yes, sir.

Q. Was the same true with respect to poles?

A. Yes, sir.

Q. And lines?

A. Any material he got from us was true.

Q. But the meters that were installed were Powell meters and still are?

A. They are Powell Valley meters.

Q. Now what—when and were was the rate to be charged negotiated? Was that part of this conversation over a period of time about which the rate was arrived at?

A. I would say yes to that question.

Q. There was no specific conversation where the rate was finally set forth on a piece of paper or anything of that nature?

A. Well, there must have been a final summary of the [fol. 171] thing, but I would say that this was arrived at on different conversations.

Q. Now was the rate the same as on this exhibit 4, card for the residential rate?

A. The rate per kilowatt hour is the same.

Q. Now that is what the customer of the town paid for the electricity supplied through this municipal system?

Mr. Cridlin: Just a minute. What are we talking about? The rate Powell Valley is charging them for power, or the rate the towns are charging them? I don't understand.

Mr. Rowntree: That was the purpose of this question, to find out which it was.

By Mr. Rowntree:

Q. Was this rate on Exhibit 4, was that paid by the customer of the town for this power?

A. This is paid by the ultimate consumer.

Q. Now what did the Powell Valley charge the town for the power?

A. Well, that's quite an accounting process. We are charging them our wholesale rate plus one mill per kilowatt hour for the transmitting of the energy over our lines. I believe this is correct. This is pretty detailed stuff.

Q. Now I believe Powell Valley handled the billing and [fol. 172] collection of the money for the towns, is that true?

A. Yes, sir.

Q. And the customers, were they customers of Powell Valley? I mean the ultimate consumer?

A. No, sir, they are set up as customers of the Tazewell-New Tazewell Power Board here in our records.

Q. Well, were they members of the cooperative?

A. No, sir, they are not members of the cooperative. Some of them may be at other points, but not in connection with this.

Q. Well, are the towns members of the cooperative?

A. I believe they are.

Q. Do you have a breakdown of your customers as to classification, who can be members?

A. What's that question again?

(The last question was read by the reporter.)

A. I don't follow your reasoning on that question.

Q. Well, generally a customer would be an owner of a residence who wants some service. What about a large factory now? Is there a classification that covers him for membership?

A. He's an industrial customer.

Q. What are the requirements for an industrial customer to become a member that would differ from an individual [fol. 173] house owner becoming a member?

A. Well, his becoming a member would be the same as far as I know.

Q. And those requirements are that the name is submitted to the Board or to a meeting of the membership on a regular annual meeting?

A. That's correct.

Q. And that he be approved and pay five dollars, is that correct?

A. Well, this is a—as far as I know, this is it.

Q. Well, when was—when were the two towns approved as members?

A. I couldn't answer that. The way that I answered that, they were members. I think they have in the past put some street lighting on and that they are set up in our membership files as members.

Q. But there was no action to give them membership that you can recall after this letter of September 24th when you made your commitment for the power?

A. No, sir, there was none that I know of?

Q. Do you have a record of your membership?

A. We have membership files, cards, set up on each member.

Q. Could we see the membership cards on Tazewell and New Tazewell?

[fol. 174] (Discussion off the record.)

The Witness: We are having trouble finding these things. Now these are accounts set up for street lighting purposes,

and they are still looking for them. They must be in some name other than——

By Mr. Rowntree:

Q. That's separate and apart from this municipal system?

A. This has nothing to do with this municipal system.

Mr. Cridlin: Had it under "City", no wonder we couldn't find it.

Mr. Rowntree: This is a card showing City of Tazewell, membership date September 5, 1961, amount $5.00, address Tazewell, Tennessee.

By Mr. Rowntree:

Q. What is this "date removed" here mean?

A. That was the date that something was removed.

Mr. Cridlin: Looks to me like it was removed before they got the membership. 7-9-61 removed, and had over here the membership date is 9-5-61. So another one has been apparently before that. I don't know anything about it.

The Witness: I don't know enough about it to tell you all the details, but they had one type of street lighting [fol. 175] system in there, and they took down the old lights and put up some new ones, and I'd say that had something to do with that removed date there, put up some new mercury vapor lights.

By Mr. Rowntree:

Q. Isn't this municipal system just part of the Tazewell system, I mean part of the Powell Valley system?

A. Well, I don't think it is.

Q. Well, they are members, are they not?

A. No, sir.

Q. Did you have anything to do with negotiating a loan by the Powell Valley bank of Jonesville to the two towns?

A. In what connection again?

Q. Did you have anything to do with bringing the parties together or helping to negotiate?

A. Yes, sir, I'd say that I did.

Q. To what extent there?

A. Well, they met here in the office, and—I mean they met here and talked with an attorney, I believe, and then went on to the bank. I didn't go to the bank with them.

Q. Did you call the bank and tell the bank they were coming?

A. No.

Q. Are any of your directors, directors of Powell Valley, [fol. 176] directors of the bank or connected with the bank?

A. No.

Q. Were any of your directors at the time of this loan connected with the bank?

A. Not that I know of.

Mr. Cridlin: One or two of them might be depositors, if you call that a connection.

Mr. Rowntree: I don't mean as depositors.

By Mr. Rowntree:

Q. Now who has done the recent establishment of new services, power services in Tazewell and New Tazewell since Irby Construction Company left besides Kentucky Utilities?

A. Which services?

Q. How about March, 1964, four-pole extension near Baltrip and C. M. Johnson?

A. Well, I would assume that since you have it on that list that KU didn't build this one.

Q. That's correct.

A. And other than that, I can't—I really can't answer that one. I don't know who it served.

Q. What about this April, 1964, a one-pole extension to serve Lawrence Muncey?

A. I think that was built by Powell Valley; the name rings a bell.

Q. Is it part of Powell Valley's system or part of the [fol. 177] municipal system?

A. Well, if it's the one that I think it is, it's Powell Valley.

Q. What about this April, 1964, a one-pole extension near Kenneth Western to provide temporary service for home being built by Mack Gray?

A. I don't even know where that one is.

Q. What about April 30, 1964, temporary service on

existing pole for new home being built by Darrell Campbell?

A. I don't think I know anything about that one.

Q. What about April 30, '64, service dropped to new house owned by Jack Billingsly near Danna Day?

A. I don't know where that one is either.

Q. May 7, 1964, thirteen-pole extension from near the homes of Glen and Tommy Lester through the Mark Lewis farm into New Tazewell to a point near the Howard Beeler home and the colored church?

A. Did this tap serve Mark Lewis' son, Bill Lewis?

Q. Will Lewis, yes.

A. I think he is Mark Lewis' son. Powell Valley built that.

Q. Is that part of the Powell Valley system or the municipal system?

A. That's part of the Powell Valley system.

Q. May 8, 1964, temporary service on existing pole to [fol. 178] provide temporary service for a house being constructed for resale by Fred Lifford, Earl Sandefur and Bill Poore in the Coffey subdivision?

A. That one is a part of the Tazewell system, I believe.

Q. Who did the work on that?

A. Well, I'm not sure who did it, but I'm sure that somebody from—some of Powell Valley personnel did it, under the direction of the people at Tazewell, the mayor.

Q. April 21, 1964, one-pole extension and temporary service for new building being constructed near the Coffey Funeral Home?

A. I don't know.

Q. Well, skip down to June 2, 1964, a four-pole extension to serve a trailer occupied by Clay Neeley.

A. Four-pole extension?

Q. Yes, sir.

A. I don't know.

Q. You don't know?

A. These names, very few of these names mean anything to me.

Q. June 11, '64, two-pole extension to serve a house recently moved by Paul Crutchfield formerly occupied by Clarence Overton. Do you recall that?

A. Well, I know there's one out in the west end of New

[fol. 179] Tazewell that was moved. Now whether this is the house or not, I don't know.

Q. Did Powell Valley make a connection with that house after it was moved, the house that you recall?

A. The one I recall, it is being served by Powell Valley.

Q. And that's part of Powell Valley's system?

A. As far as I know, it is.

Q. June 17, '64, an eight-pole extension along U.S. 25-E in Tazewell located across the highway from KU Company facilities to serve a new building being constructed by Mayor Ed Hardin, III, and a building on the Lon Francisco property being constructed by George Malone and Bill Harrell near the Claiborne County Courthouse?

A. Well, this was built by—let's go back to the original question, what are we asking?

Q. Who did the work; whose facilities are these?

A. These are the town of Tazewell.

Q. This eight-pole extension?

A. Yes.

Q. All of these others, are they——

A. No, just——

Q. Just this one?

A. We are just talking about the one to the mayor's building down there.

[fol. 180] Q. So this is a part of the Tazewell system?

A. Yes, it is.

Q. Now who did the work on that?

A. Powell Valley forces did the work.

Q. Have you billed the town for that?

A. I don't know whether we have or not.

Q. Did you use your own equipment and your own men, workmen, to do that work?

A. Yes, sir.

Q. July 13, '64, a two-pole extension to provide temporary service for a residence being constructed by Earl Fultz.

A. I don't know anything about that.

Q. July 17, '64, a two-pole extension to provide temporary service for the new textile factory.

A. Yes, that was a rather unusual one. I think that's built by a combination of Powell Valley and Claiborne County Telephone Company.

Q. Is that part of the Powell Valley system, or the municipal system?

A. Well, that must be partly Powell Valley and partly Claiborne Telephone, and I honestly don't know whose poles they are. It was just to put in temporary service for the factory, telephone and power.

Q. Now I would like to see the rest of these REA— [fol. 181] that is the papers that we were talking about relating to REA which would be 81, 106, and 123.

Let me ask, Mr. Miner, what is the ultimate understanding between you and the towns as to these recent extensions that we have just been going over? Will that become part of the municipal system ultimately, or is this to remain— those that are Powell Valley, are they to remain Powell Valley facilities even after a municipal system is established?

A. Well, I hope they remain Powell Valley.

Q. Those that are Powell Valley, you hope will remain Powell Valley?

A. Yes.

Q. Well, has it been considered by the Board of Powell Valley or by yourself as manager that all facilities of Powell Valley other than transmission lines and substations, all service—including all service facilities that is, will become— will be acquired by the municipal system?

A. Well, we have thought about—the people down there talked about this thing a little bit once.

Q. On the other hand—well, has a decision been made concerning that?

A. Well now, I don't think this has ever been mentioned in a board meeting, and I'm not sure that it's been con- [fol. 182] sidered too much anywhere.

Q. Well, on the other hand then, is it the ultimate plan for Powell Valley to take over the municipal section after this case and after a municipal system has held to be established in this case?

A. Well, I'd like to see Powell Valley take it over, certainly.

Q. It would add considerable business to Powell Valley certainly, would it not?

A. Yes, sir.

Q. And you have some customer contracts down there,

or you would have good customer contracts down there after you took over such a system?

A. Yes, sir, there's no question about that.

Q. Now we'd like to file this letter of August 29, 1963, from Mr. Callaway of REA in Washington to you as Exhibit Number 12.

(The document referred to was marked for identification as Exhibit No. 12, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Have you received any other communication from REA besides that letter approving activities of Powell Valley in connection with this Tazewell-New Tazewell power situation?

A. I don't believe so.

[fol. 183] Q. Now this letter of March 24, 1964, from Mr. Callaway to you does request an answer to the Kentucky Utilities letter of complaint which was sent to REA, does it not?

A. Yes, sir.

Mr. Pedersen: What is the number on that?

Mr. Ardery: March 24, 1964.

Mr. Pedersen: 106, that's what I'm going by.

Mr. Rowntree: We don't need to exhibit that.

By Mr. Rowntree:

Q. And the Kentucky Utilities letter of complaint was March 10, 1964?

A. Yes.

Q. Now in this memorandum that you prepared for Mr. Steele, that concerns, does it not, a meeting held by the Board of Powell Valley with representatives of REA?

A. Well, it is concerning a board—a meeting of the Board of Powell Valley at which these fellows were present. I think this was—just happened to be, they were here.

Q. And are you explaining to Mr. Steele, who was your Board Chairman, the remarks made by these REA men at that meeting, is that right?

A. That's correct.

Mr. Rowntree: We will just read in the third paragraph of that memo, quote:

[fol. 184] "He stated——"

By Mr. Rowntree:

Q. Does that refer to Mr. Peters of REA?

A. Let me look at it. Yes.

Q. "He stated during the Board meeting that no loan funds could be made available for the acquisition of these facilities. However, he made it clear that REA would not stand in the way of Powell Valley Electric in acquiring the properties. He also said we should help these people in any way we could without initiating any action ourselves."

Do you recall the date of this meeting?

A. No, sir, I don't.

Q. So it is the ultimate purpose of Powell Valley to acquire the power facilities of the towns in Tazewell and New Tazewell, is that right?

A. Well, I'd say as manager of Powell Valley, I'd certainly like to see them own it some day.

Q. And you have been active with respect to this project for some period of time with that point in mind, is that not true?

A. Well, I've been as active as the people in Tazewell and New Tazewell have asked me to be. Let me qualify that. I haven't been either. If I had been as active as they have asked me to be, I don't believe there would be a KU [fol. 185] customer left in Tazewell or New Tazewell.

Q. And as a matter of fact, this system is really part of the Powell Valley system today, is it not?

A. No, I don't think you could say that. I think they could still do anything they want to.

Q. Is this not just like any other membership situation on wholesale rate?

A. No, I doubt seriously if you will find another one like this in the world.

Q. Well, by becoming members, the towns could be considered simply part of the Powell Valley system, is that not true?

A. I'd say you'd have to get a legal interpretation on that one.

Q. Well, are they members?

A. Who?

Q. The towns?

A. Well, in connection with this street lighting that I talked about a while ago.

Q. Doesn't that pertain to this municipal system that we have been talking about, that membership?

A. I wouldn't know whether it does or doesn't.

Q. So really, they are really just extensions of Powell Valley's system?

A. No, I——

[fol. 186] Q. By reason of membership?

A. I don't think so.

Q. You never considered them as such?

A. No.

Q. Have you acquired any other systems in this manner?

A. No.

Mr. Pedersen: I object to the conclusion that they have acquired this system. That assumes just the opposite of what he's saying.

By Mr. Rowntree:

Q. By way of membership, I suppose you'd have to qualify that, by reason of membership in the cooperative?

A. Well, we better back up and start all over then. I'm not sure that I understand what you are asking.

Q. Well, as I understand it, you say they are not members for this municipal system, is that right?

A. Well, I said I'm not sure that I know how this membership that they have would apply to this electric setup.

Q. So really they could be considered as facilities of Powell Valley under its membership rules?

A. No.

Q. All right. One more thing. Could we get a list of customers of the towns? I suppose this is the only place we can get it, who the customers are that the bills are being [fol. 187] collected for the towns?

Mr. Cridlin: It would be up to you, I think, Mr. Ardery.

Mr. Ardery: I think I understand you. Let me see if I do.

Mr. Rowntree: All right.

Mr. Ardery: You want a list of the customers that are being billed in the names of the towns.

Mr. Rowntree: That's right.

Mr. Ardery: I don't see any objection to that.

The Witness: Well, they were supplied in the exhibits up until just recently.

Mr. Cridlin: If the towns have no objection, certainly we don't. It's up to them.

Mr. Ardery: Well, I suggest if they are not already provided that we provide them.

Mr. Pedersen: I don't think they have provided them. If they were, at least I haven't seen them.

Mr. Ardery: Mr. Rowntree, we will get a list for you.

Mr. Rowntree: All right, fine, if you will provide that as Exhibit 13.

(The list requested, to be furnished subsequent to the taking of this deposition, will be marked Exhibit No. 13, and filed as exhibit to this deposition.)

[fol. 188] Mr. Rowntree: That's up to date. What I'm particularly interested in, I might say, is to see which system these new additions are coming under. That's one thing I wanted to make sure of, which system they are coming under, so that would require an up-to-date list.

Mr. Cridlin: By up-to-date, you mean as of this date?

Mr. Rowntree: Yes.

I think that's all, gentlemen.

(Discussion off the record.)

Mr. Ardery: We will furnish Exhibit 13.

Mr. Rowntree: And two and three.

Cross-examination.

By Mr. Cridlin:

Q. Mr. Miner, I hand you a document here, a memorandum headed "Summary of My Knowledge of the Tazewell-New Tazewell Power Situation", and ask you if these were notes made by you concerning the Tazewell-New Tazewell situation?

A. Yes, sir.

Q. I'll ask if you will file that as Exhibit 14.

(The document referred to was marked for identification as Exhibit No. 14, and filed as exhibit to this deposition.)

Mr. Pedersen: You want to show that those were notes [fol. 189] referred to on direct examination, to be clear it's the same ones?

Mr. Cridlin: Yes, maybe we better do that.

By Mr. Cridlin:

Q. Are these the same notes that were referred to on direct examination, a part of which was read into the record by Mr. Rowntree?

A. Yes, sir.

Mr. Rowntree: That's particularly the first and second full paragraphs on page 2.

Mr. Cridlin: I didn't know which it was.

By Mr. Cridlin:

Q. Particularly the first and second full paragraphs on page two of the memorandum?

A. Yes, sir, these are the same notes.

Further Deponent Saith Not.

Ralph B. Miner, By: Clyde Y. Cridlin.

Sworn to before me this the 20th day of August, 1964.

Clyde Y. Cridlin, Commissioner in Chancery, Lee County, Virginia.

My commission expires: —

[fol. 190] Notice of Taking Deposition and certificate of service (omitted in printing.)

[fols. 191-192] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

[Title Omitted]

Civil Action No. 4861

DEPOSITIONS OF:

Mr. Paris T. Coffey
Mr. Harry Rowe
Mr. Edward J. Hardin, III
Mr. James B. DeBusk
Mr. William R. Stanifer

Tazewell Tennessee
August 19, 1964.

[fol. 193] Exhibits

Number	Description
	(To the deposition of Mr. Rowe)
1	Map—Section 1, Approved Map Showing Agreed Territorial Boundary Lines between KU Company and PVEC in Tennessee
2	Map—Section 2 of Exhibit 1
	(To the deposition of Mr. Hardin)
3	Resolution, 2-19-63, City Council of Tazewell requesting reduction of electrical rates
4	Minutes of Council Meeting, Tazewell, Tenn., May 14, 1964
5	Petition of Tazewell Municipal Electrical System
6	Questions of KU to customers concerning electrical service
7	Letter, Ardery to DeBusk, 8-14-63; Contract of Employment, Ardery; Contract of Employment, Stanifer; letter, undated and unsigned, to Miner; letter undated and unsigned to Fairman
8	Minutes of Council, Tazewell, authorizing establishment of municipal electric system
[fol. 194]	
9	Resolution of Tazewell City Council giving mayor authority to negotiate notes
10	Contract, 10-29-63, between mayor of Tazewell and Irby Construction Company
11	Customer application for electric service in Tazewell
12	Resolution of Tazewell City Council establishing joint municipal eletric system, if any exists
13	Negotiable Revenue Anticipation Note, 1-16-64, to Powell Valley National Bank from Tazewell
14	Accounting statement from Powell Valley Electric Co-op to City of Tazewell
	(To the deposition of Mr. DeBusk)
1	Resolution, 10-21-63, Council of New Tazewell to hire counsel and establish municipal power system
2	Petition of New Tazewell municipal power system
3	Resolutions, if any, re: power system, subsequent to 10-21-63, Council of New Tazewell
4	Resolution, if any, authorizing establishment of municipal power system prior to 10-21-63
5	Resolution, if any, re: issuance of revenue notes
6	Negotiable Revenue Anticipation Note, 1-16-64, to Powell Valley National Bank from New Tazewell
7	Accounting Statement from Powell Valley Electric Co-op and/or Powell Valley National Bank to New Tazewell

Depositions

[fol. 195] These pre-trial depositions are taken at the request of the Plaintiff, pursuant to notice, copy of which is attached hereto, and by agreement, pursuant to Rule 26, Federal Rules of Civil Procedure, before Georgella Mankin, Notary Public at Large, State of Tennessee, on the 19th day of August, 1964, in the Chancery Courtroom, Claiborne County Courthouse, Tazewell, Tennessee.

It is agreed that after the depositions have been transcribed, the names of the witnesses may be signed by the court reporter, the signatures of the witnesses being hereby waived.

The parties did not invoke the rule at this time, and Mr. Lewis, a representative of the Plaintiff, was present in the deposition room, as were the witnesses, without waving their rights to testify as witnesses in this cause.

All formalities as to caption, certificate, transmission, etc., are hereby waived.

[fol. 196] PARIS T. COFFEY, a witness of lawful age, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?
A. Paris Coffey.
Q. How old are you, Mr. Coffey?
A. Fifty-two.
Q. What is your work, position?
A. Mortician.
Q. In what community?
A. Well, Claiborne County, classified, I suppose, Tazewell and New Tazewell.
Q. Were you a member of the Chamber of Commerce of Claiborne County in 1961 through '63?
A. Yes.
Q. Have you done any work in the line of subdivision, residential subdivision and construction of houses?

A. Yes, sir, I have.

Q. Do you have a subdivision in any of the two towns?

A. I have one in Tazewell now, part of it, still have part of it left, but I did have all of it to start with.

Q. Was your brother associated with you?

[fol. 197] A. Yes, he was at the beginning.

Q. And what's his name?

A. General.

Q. General DeBusk?

A. General Coffey.

Q. General Coffey, I'm sorry. Do you recall when your first house was constructed on that subdivision that a question came up as to who was to supply the electricity to the house?

A. Yes, I recall the question coming up concerning the electricity.

Q. Can you state the nature of the discussion and so forth concerning that house?

A. Well, when we built the house, when we bought the property—let me go back and answer this way.

When we bought the property, we had REA line on the property, so I bought the property with—or my brother and I bought it with the understanding that we had REA power. So after we bought it, we—my brother and I, I bought his part out. Then the land—I mean it was after—the first building—I'll go back to that—the first building which were built, I bought his part of it later, but the very first building we built, he was still with me, and the question come up what kind of power, and it was my understanding that we would have the REA power, but when we [fol. 198] started to build, I talked to Mr. Rowe back there, and talked with the KU, and there were a question in their mind. Now what their agreements were, I don't know, but there were a question in their mind who would furnish power.

So we tried to get the cheaper power. They, in their argument was, and I did want to go on into a lawsuit with it to test it out who would be able to furnish us power, but in their argument was they finally settled, and said you are going to have to have KU, but now who was legally responsible for that or how, I don't know.

Q. The matter was settled that KU——

A. That matter was settled between them, not us.

Q. Between KU and Powell Valley?

A. So far as I know, yes.

Q. Now was there a second house in which the same question arose?

A. Yes, there were a second house in which the same question arose, but I did definitely question the cheaper power, because I bought the property with that in mind, and could definitely sell our houses easier under cheaper rates.

Q. Was the second house settled the same way?

A. Yes.

Q. Do you recall when these two houses, the question arose with respect to those two houses?

A. The date I don't know; I couldn't tell you.

[fol. 199] Q. Was it before——

A. We built those houses, I believe in '62. I can go back and get you the record, but I'm not positive on that.

Q. That's your best recollection?

A. Something, yes, I believe, I wouldn't say the time, but I can go back and get you the record on it. I don't know.

Q. Mr. Coffey, do you recall the council meeting at Tazewell and New Tazewell on or about March 13, 1963?

A. I was in some council meetings with Tazewell and New Tazewell, but the date, I couldn't say which—what month.

Q. Do you recall making the statement to the effect that REA would liquidate any bonds sold by the towns for facilities to get cheaper rates?

A. No, sir.

Q. Do you deny that you made such a statement?

A. I don't think I made a statement in that effect. I will answer you this way, that we were trying to get cheaper power, and we were hunting cheaper power, and the fact that the cities here were going to build their own unit, but it might—by the operation of some other company, maybe Powell Valley or some other company, they might operate it for us and liquidate the debts, but never—I'll say this [fol. 200] frankly—never has Powell Valley, TVA, ever obligated them in any way to us to come here and do anything concerning building a plant.

Q. Do you recall that subsequently a public correction of

such a statement by you was published in the newspaper, particularly in the "Middlesboro Daily News", wherein Mayor DeBusk stated that a recent statement made by you that the Rural Electrification Administration would liquidate any bonds sold by the towns for the purchase of Kentucky Utilities facilities was in error, do you recall that?

A. They—now I'll tell you concerning the write-up in the Middlesboro paper. As president of the Chamber of Commerce, I believe, at that time, they called me on different occasions concerning how we were getting along over here with the power situation, and I made some statement to them, but I never made a statement to them concerning the fact that—concerning Powell Valley or TVA or anything in that line, in that effect, and I was about to call them, I remember that very vividly, I was about to call them and tell them they had made a misquotation in the paper, but I didn't think there was any essence to it at that time, and just let it ride by.

Q. I'll read a statement out of a document furnished by Powell Valley Electric Cooperative, number 93, the second page, first paragraph concerning a meeting held November the 27th, 1962, in the office of TVA at which the memoran- [fol. 201] dum states you were present, quote:

> "Means of financing this venture were discussed, and the concensus of opinion was that it would need to be financed with revenue bonds. These bonds do not obligate the towns in any way, but would be retired with the revenues of the electric system.
>
> "Representatives of the cooperative informed the people at this meeting they would be willing to operate this system, make necessary replacements and improvements out of their general funds and retire the revenue bonds as they came due."

Was that the general basis for any statement made by you?

A. I don't recall of there—of them even doing that as far as my memory concerning that. I don't recall that part being discussed, and the basis for my statement, as I said a while ago, was the fact that we were searching for lower power and someone to operate it or operate it ourself, and we discussed the building of it ourselves. Now as far as Powell

Valley, them making a statement to that concern, I do not remember.

Q. Did you make any statement at all at a council meeting concerning the retirement of bonds?

A. I may—you mean at this meeting in Knoxville?

Q. No, I'm talking about at a later council meeting.

[fol. 202] A. Here in town, the council meeting here in town?

Q. Right.

A. I think I made the statement one time in here, that it wouldn't cost the cities, as I understood anything, that it would be retired, that the debt would be retired from the revenues that we would receive under the bond issue or something in that manner. At the time I don't remember the exact wording, but something to that effect.

Mr. Rowntree: That's all.

Further Deponent Saith Not.

Paris T. Coffey, By: Georgella Mankin.

Sworn to before me this the 19th day of August, 1964.

Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal).

[fol. 203] HARRY ROWE, a witness of lawful age, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?
A. Harry Rowe.
Q. And where do you live, Mr. Rowe?
A. I live in New Tazewell.
Q. Were you employed at one time by Powell Valley Electric Cooperative?
A. I was.
Q. What was your position with that cooperative?
A. I was locally, in this area, responsible for the service and maintenance for that organization.
Q. When were you so employed, at what period of time?
A. From—in the neighborhood of 1942 until 1962.
Q. Are you here under subpoena?
A. I am.
Q. Do you recall whether a problem came up while you were occupying that position as to what territory Kentucky Utilities would serve, and what territory Powell Valley Electric Cooperative would serve in the Tazewell and New Tazewell area?
[fol. 204] A. Well, that was a problem as long as we were —as I was with the company.
Q. And do you recall whether or not a settlement was made of that problem somewhere around 1958?
A. There was an agreement reached about encroachment, the exact date I won't be positive of, but I would say in that general vicinity, yes.
Q. Was an effort made or do you recall whether or not after it was made to set forth that settlement on maps?
A. There was, and I did extensive work on that.
Q. Who were you working for in that project?
A. I was working for Powell Valley Electric Cooperative.
Q. Were maps drawn up between Powell Valley Electric Cooperative and Kentucky Utilities?
A. They were.

Q. I show you two maps and ask you if these are copies of the map that you have just mentioned? Section number one of the map showing the area around Tazewell and New Tazewell, and then section two of the map showing the area north of the first section.

You can stand up if you want to.

A. I believe that would be a copy of the maps that were prepared at the time that I was working on it.

Mr. Rowntree: We will file these as Exhibit 1 being [fol. 205] sequence 1, and Exhibit 2 being sequence two.

Mr. Ardery: Have you got other copies of those maps?

Mr. Rowntree: We can get other copies; we don't have them here today.

Mr. Ardery: Would you?

Mr. Rowntree: Yes, sir, we will.

(The maps referred to were marked for identification as Exhibits No. 1 and 2, respectively, and filed as exhibits to this deposition.)

By Mr. Rowntree:

Q. You say that this was a pretty extensive operation in getting up these maps, Mr. Rowe?

A. Yes, in answer to that question, it was quite a bit of time and effort put into this on the part of myself representing the cooperative, and Mr. Osborne representing the Kentucky Utilities.

Q. And you all worked together on that, did you?

A. Yes, sir.

Q. Now did Powell Valley Electric Cooperative use these maps?

A. As long as I was working for the organization, why we—unless it was a case of inadvertent crossing the boundary, why we adhered to these maps. That was from the [fol. 206] time that they were prepared.

Q. Do you recall whether or not they were used in making disposition of questions that might arise as to who would serve a particular location?

A. They were.

Q. Mr. Rowe, do you recall attending a meeting in Cedar Grove in Claiborne County about April of 1962?

A. I do.

Q. Who arranged for that meeting to be held?

A. Well, I in part helped arrange for it, and Mr. Berry who was manager of the cooperative at the time, after some of the local contacts was made carried on from there.

Q. Who did most of the talking at that meeting?

A. An attorney for TVA.

Q. Do you recall his name?

A. No, sir, I don't.

Q. Will you state whether or not anything was mentioned about a tri-party agreement?

A. As I recall the tri-party agreement was the focal point of the whole meeting just about.

Q. And what was the nature of the discussion concerning that agreement?

A. That anything that the TVA might do, unless it was done in the proper manner, might jeopardize the tri-party agreement, or that things couldn't be done as long as that [fol. 207] tri-party agreement might remain in force.

Q. Did the TVA indicate at this meeting that the supplying of TVA power to Tazewell and New Tazewell would be possible?

A. Well, it all depends on exactly what you was looking for. You could very readily draw that inference.

Q. Did you participate in a conversation, or were you present at the time of the conversation prior to 1963 with a Mr. Walter Carpenter of the REA Washington office?

A. I was.

Q. And what was the nature of that conversation?

A. This same subject came up, and in the course of the conversation, he said he felt like that if the area could show that prices were out of reason and that the service was not adequate, that REA would loan the money to take over the system or replace it, or words to that effect.

Q. That is as to Tazewell and New Tazewell?

A. That is correct.

Mr. Rowntree: I believe that's all.

Mr. Ardery: Mr. Rowntree, would you give us just a minute, we may want to ask Mr. Rowe a question or two, and we may not. Give us just a minute, if you don't mind.

(A short recess was taken.)

Mr. Ardery: Mr. Pedersen has got a question.

[fol. 208] Cross-examination.

By Mr. Pedersen:

Q. Who was it you say arranged a meeting, Mr. Rowe, the Cedar Grove meeting?

A. Well, some local people asked if it would be possible, and I asked Mr. Berry, who was manager of the cooperative at that time, and he carried on the arrangements from there.

Q. I see. Who were the local people that asked for the meeting to be arrange, do you know?

A. Mr. Stanifer here was one; J. M. Campbell was the other one. And that's all that I recall at the time.

Q. Did you give an affidavit to anyone in connection with this meeting?

A. I did.

Q. On the 11th of November, 1963?

A. On or about that date, I would guess.

Q. And in there you state that the TVA representatives made absolutely no commitments or promises, is that correct?

A. As I recall, they made no promises or commitments.

Q. But that they suggested that the towns proceed in a certain manner, that TVA service might be possible?

A. Yes, sir.

[fol. 209] Q. Is that substantially correct?

A. That's substantially it.

Mr. Pedersen: That's all we have.

Mr. Rowntree: That's all, and thank you very much.

Further Deponent Saith Not.

Harry Rowe, By: Georgella Mankin.

Sworn to before me this the 19th day of August, 1964.

Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal).

[fol. 210] EDWARD J. HARDIN, III, one of the Defendants, having been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir.
A. E. J. Hardin the III.
Q. And how old are you, Mr. Hardin?
A. Thirty-five.
Q. And where do you reside?
A. Tazewell.
Q. What is your business?
A. Well, do you mean—I'm the mayor of Tazewell and I'm also in the insurance business.
Q. You are in the insurance business?
A. Yes, sir.
Q. What period of time have you been or were you mayor of Tazewell, Tennessee?
A. I took office as mayor in January of '63.
Q. And are you still mayor?
A. Still mayor, sir.
Q. Is the town of Tazewell an incorporated municipality?
A. Tazewell is incorporated as the Town of Tazewell, municipality.
[fol. 211] Q. Is it incorporated under the general municipality law of Tennessee?
A. Well, we are under charter issued by the State under a mayor and councilman—mayor-alderman.
Q. Alderman?
A. Alderman; some people call them councilmen and some aldermen.
Q. Do you have a charter by a special act of the legislature or by the general law of the state?
A. I don't recall right offhand.

Mr. Rowntree: Will counsel stipulate as to which it is?
Mr. Stanifer: It's the general law.

By Mr. Rowntree:

Q. Mr. Hardin, does the municipality of Tazewell have an ad valorem tax levy?

A. We have no taxes.

Q. How does Tazewell get it finances to operate?

A. Well, we have revenue that we share from the State from sales tax and gas tax, and of course we have beer tax.

Q. Is there any other source of revenue besides those?

A. Well, we get a dollar for a building permit.

Q. And Tazewell doesn't have many expenses, I take it.

[fol. 212] A. Well, we have some—of course we have expenses. The usual expenses for a small town.

Q. Does Tazewell maintain its own streets?

A. Yes, sir.

Q. Do you have public schools of the city?

A. No, sir.

Q. Do you have a city hall?

A. Well, we share an office with the Sessions Judge here in the courthouse. We have our meetings in it.

Q. Sessions courtroom?

A. The Sessions Judge's office; he shares it with us.

Q. Were you present at the meeting at Cedar Grove April 12, 1962, or do you recall that specific date?

A. Not that specific date. I was present at a meeting at Cedar Grove, a Chamber of Commerce meeting at Cedar Grove.

Q. Were you a member of the Chamber of Commerce at that time?

A. Well, let's see. As an individual.

Q. You were not mayor at that time?

A. No, sir.

Q. Do you recall any statement by TVA representatives at that meeting that it would not be feasible for the towns [fol. 213] to set up a separate municipal electric system?

A. Well, I don't at this time. I mean I don't remember any particular statements, and since I was a guest, we met and eat and I was invited, and I didn't join in any particular conversation with anybody because——

Q. Who invited you to the meeting?

A. The mayor at that time.

Q. Who was that?

A. Joe Frank Essary.

Q. You don't recall anything specific that was said at that meeting, or do you?

A. Well, I couldn't say that I particularly remember any particular statements. I didn't make any statements that I recall.

Q. What was the——

A. In other words, I was there, and of course you know how it is in a meeting, you just talk to people sitting besides you and just general discussion.

Q. What was the general impression that you got from that meeting?

A. Well, the general impression was that we of course wanted to—we were trying to get more electrical power, and find out some of the fundamentals about how our—how the town could acquire lower power.

Q. Do you recall that there was some discussion of the [fol. 214] problem of agreements to which Kentucky Utilities was a party that would be an obstacle to the supply of TVA power in the two towns?

A. Well, not particularly. I knew—I had heard that there had been some kind of an agreement about the power business, and that's about all I know about the agreements.

Q. Do you recall that a short time after that meeting or some time after that meeting an agreement was canceled, an agreement between Powell Valley and Kentucky Utilities?

Mr. Pedersen: I didn't catch that question. Would you read it back?

(The last question was read by the reporter.)

By Mr. Rowntree:

Q. Do you know anything about that?

A. Well, I mean, I wouldn't—I don't know—don't know enough about it. Maybe I heard that there was an agreement, and that it was terminated, or something, but as far as the agreement was concerned, I don't know what kind of agreement it was.

Q. You never saw it?

A. I never saw it.

Q. Did you know the nature of the agreement?

A. No, sir.

[fol. 215] Q. Do you recall that a short time after that agreement was canceled that another meeting was requested and set up between the towns?

Mr. Ardery: Now I object to the form of the question. He said he didn't know anything about the agreement.

By Mr. Rowntree:

Q. All right, sir. Do you recall that in November another meeting was set up between the towns, Powell Valley, and TVA, November of '62?

A. I have never—the only meeting that I was ever present at was the meeting at Cedar Grove. I've never——

Q. You didn't——

A. —went to——

Q. Did you hear about this other meeting, or were you invited to attend?

A. I don't remember.

Q. All right, sir. Were you a member of the city council in '62?

A. Yes, sir.

Q. Do you recall any discussion at city council meetings in that year concerning this electric power project?

A. Well, of course the best I remember, the city council has met at different times to discuss the possibilities of acquiring lower power for the people of the towns since the [fol. 216] people were wanting lower power rates.

Q. Do you recall any specific meetings in '62 that this was discussed?

A. The exact date or exact meeting, I don't.

Q. Were you present when Mr. Cottrell met with the towns concerning an appraisal of the Kentucky Utilities property?

A. I was present at one meeting where they talked to Mr. Cottrell about his services. You are speaking of Mr. Cottrell, the engineer?

Q. That's right.

A. Yes, sir.

Q. And Mr. Cottrell came over from Nashville and talked

to the members of the council concerning an appraisal of Kentucky Utilities property?

A. Well, he come over—we—the best I remember we asked him to come over so we could discuss the possibilities of him—of his services in connection with—along with the steps of acquiring our own system.

Q. Do you recall whether or not Mr. Cottrell was employed to make an appraisal?

A. Actually employed, he never was actually hired at that time.

Q. Was he ever hired to make an appraisal?

A. To make the appraisal of the property?

[fol. 217] Q. Yes.

A. No, sir.

Q. Was an appraisal ever made to your knowledge?

A. You're speaking of appraisal of the——

Q. Kentucky Utilities property.

A. Kentucky Utility system?

Q. Yes.

A. No, sir.

Q. Do you recall the council meeting in 1963 wherein it was urged by any individual that the Tennessee Public Service Commission be approached on the reduction of Kentucky Utility rates?

A. I remember the meeting, the exact date of that meeting, the council voted to send a resolution to Kentucky Utilities asking that the proposed—asking for a rate reduction.

Q. Mr. Hardin, I show you what purports to be a copy of a resolution and ask if that is the resolution you had in mind?

A. Yes, sir.

Q. Will you file that as Exhibit 3?

Mr. McCarthy: Is that one of the items you got from us?

Mr. Rowntree: No, this is a resolution of Tazewell.

[fol. 218] (The resolution referred to was marked for identification as Exhibit No. 3, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Do you recall what response the Tennessee Public Utilities Commission, Public Service Commission made to that resolution when it was sent to them?

A. I don't remember us getting a reply from the Public Service Commission.

Q. Do you recall being advised in a council meeting that Commissioner Hammond Fowler of Nashville made reply that a careful review indicates that no particular action is desired or needed?

A. I don't remember.

Mr. Pedersen: What was the answer? You don't know?
The Witness: I don't remember.

By Mr. Rowntree:

Q. You don't remember?

A. No.

Q. Did the Tennessee Public Service Commission ever take action to require Kentucky Utilities to reduce its rates to your knowledge?

A. Not that I know of.

Q. Does the city have in its possession any reply, any [fol. 219] written reply from the Commission in response to this resolution?

A. Not that I know of. There could be, but I don't know.

Q. I show you a copy of the "Middlesboro Daily News" for March 14, 1963, a page from that paper, and ask you if you recall any response having been made by the Commission after reading that paragraph on the left-hand column.

A. Well, New Tazewell could have gotten a reply from the Public Service Commission, but——

Q. Tazewell did not?

A. I don't remember Tazewell getting one.

Q. All right, sir. Mr. Hardin, did Tazewell pass a resolution calling for a referendum to the people on this question of supply of power in Tazewell?

A. Well, sir, I'll have to go back on that a little. In other words, we were seeking more power, and of course it had been discussed, and so we thought, well, we would call

on the Tennessee—or the lawyers of Tennessee Municipal—Tennessee Technical Municipal Service and the University of Tennessee, of which the city is a subscriber, and it's been discussed and different ways of how to go about it, so we called on him, and he came up and met with us, Mr. Puett, and asked him, you know, to find out about the proper steps and everything, and he—we discussed it with him and the [fol. 220] council and he says, well, of course, under the law, you have a right to have your own municipal electric service system, and of course, there's a chapter of law, you can have an election, or you don't have to have a general election, and—but his—but I believe his suggestion—his suggestion was that if we wanted to get the feeling of the people, we could just take a poll of the people, and by petition ask them how they wanted it, and then if council found that satisfactory, that the people wanted it, and that the people were demanding it, lower power, then hire you some good attorneys and proceed from there.

Q. Did he talk about the bond acts that were involved?

A. Well, I'm sure he did. I mean we could go under revenue bonds or revenue notes, that was in the Act.

Q. And did he talk about the requirements of the acts with respect to referendum vote of bonds?

A. I believe he did. He discussed it pretty thoroughly with us.

Q. And do you recall whether or not council took the action to call a referendum?

A. Now a referendum which way?

Q. To ask for—to hold a referendum, to hold a referendum.

A. As an election?

[fol. 221] Q. Yes.

A. As a general election?

Q. Yes.

A. Well, I believe that we had—it was discussed and council was going to have an election, but they rescinded all of that and went on the basis of the petition.

Q. At a later meeting?

A. I believe that's right.

Q. I show you what purports to be minutes of council meeting, a copy of minutes of council meeting, of Tazewell, May 14, 1963, and ask you if you recognize that as being

a copy of minutes of that meeting, and I also call your attention to the paragraph 3 there.

A. These—this is the minutes of a regular session which is, like I stated before, rescinding the meeting concerning the electrical system that we had before.

Q. And will you just read that paragraph?

A. "Minutes of a Special Meeting with the Council from New Tazewell on April 30, 1963, were read, regarding acquiring an electrical system for the two towns. Alderman Sharp moved that these minutes be rescinded as the Council did not choose to take these steps now. Motion seconded by Alderman Brooks. Motion was voted."

Mr. Ardery: This is the minutes of a meeting of Tazewell or New Tazewell?

[fol. 222] By Mr. Rowntree:

Q. Read the first paragraph there.

A. "Minutes of the last regular meeting were read and approved."

Q. Read this paragraph.

A. "Meeting called to order by Mayor Hardin."

Q. That is the Tazewell minutes, I take it?

A. Of course, it goes on in the minutes to show why that was rescinded, because it took——

Q. Suppose you read that.

A. "Mayor Hardin suggested to the Council that the City prepare a list of the registered voters within the City in the form of a petition in order to ascertain if the voters of the City wanted lower electrical rates, and if so, should the city acquire or build its own electrical power system to be financed with strictly revenue bonds in order to get lower electrical rates. He stated by this means everyone would have opportunity to express their views on the above matter. After much discussion Alderman Welch moved that the Council approve such a plan and authorize the Mayor to hire some competent person to circulate the petition to the voters and get their signatures or their rejection on the above matter. Alderman Brooks seconded the motion. A vote was ordered. Those voting for the motion were [fol. 223] Aldermen Young, Neely, Sharp, Welch and

Brooks. Alderman Eldridge voting against. Mayor Hardin declared the motion carried by a 5 to 2 majority."

Mr. Rowntree: We'll file that as Exhibit 4.

(The document referred to was marked for identification as Exhibit No. 4, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Did the council of Tazewell generally meet at the same time and places as the council of New Tazewell?

A. Tazewell meets the second Tuesday in each month, and that's—that's the same meeting night that New Tazewell has.

Q. Where does New Tazewell council meet?

A. They hold their meetings in the lodge hall in New Tazewell.

Q. Did you have any joint meetings between Tazewell and New Tazewell city councils or Board of Aldermen, Boards of Aldermen, over this question of electric services?

A. Well, we have had meetings together, I mean open meetings together, to discuss it.

Q. This question?

A. The power situation.

Q. Was Mr. Miner of Powell Valley Electric Cooperative present at some of these meetings?

[fol. 224] A. One meeting he was present that we requested him to come to the meeting so we could get information and stuff from him.

Q. Was he present at just one meeting?

A. That would be hard to say. I don't remember. He was present at the meeting that we had in the big courtroom across the hall here when both towns were there.

Q. Do you recall that he was present at a meeting on May 13, 1963, a special called meeting?

A. The dates and things, I'm trying to place it in my mind, that's been sometime ago.

Q. That was just the day before this last resolution that we put into evidence here.

A. Before this?

Q. Yes.

Mr. Pedersen: What was the question, that he was present at this prior meeting?

Mr. Rowntree: The day before this last resolution.

Mr. Pedersen: And what was the answer?

The Witness: I haven't answered.

Mr. Rowntree: He hasn't given one.

The Witness: And this was the day before our special meeting?

By Mr. Rowntree:

[fol. 225] Q. Yes.

A. Before our regular meeting?

Q. Right.

A. I believe he was.

Q. Do you recall——

A. Like I say now, this has been sometime ago.

Q. Yes.

A. And I've got nothing to tell in this matter but the truth.

Q. Yes, sir. We know you are trying to do that, Mr. Hardin.

Do you recall what Mr. Miner stated in the course of that meeting on May 13, 1964—'63?

A. Well, I'm sure it was discussed about the power situation. His exact words and the exact manner and everything that it was discussed in, I don't remember.

Q. Well, did he make any suggestions to the council as to what should be done, if you recall?

A. Well, he possibly did. The exact suggestions, of course, we asked him questions about the power business, and of course he gave us replies, and——

Q. Did he give any indication as to whether he would supply power to the municipalities?

A. I believe that he said that he could service our power.

[fol. 226] Q. Did he talk about their retirement of bonds that the municipalities might issue, the means of retirement?

A. Well, it wouldn't be—I'm sure we discussed the bonds because that was——

Q. And how they were——

A. Because that was interesting, that was an important

factor about acquiring the system was a means with which to pay for it. And of course we knew—I mean that there could be bonds issued for it.

Q. And I suppose that people were concerned about the fact that the cities might have extra expense? Was there any discussion about whether this would cost the city anything?

A. Well, I'm sure that when the councilmen raised the question as to the expense, I mean I don't know what wording or who it was, but I imagine that was discussed, and of course we were going on the theory that it would be on revenue basis from the system that would be derived from the system would pay for it, and that it would require no taxes or expense on the people.

Q. Had it been discussed at that point how the system would be operated? Would the city operate it itself or would Powell Valley operate it, do you recall?

A. I don't recall.

Q. Was Mr. Miner present at the meeting of May 14th when this referendum resolution was rescinded?

[fol. 227] A. I don't remember.

Q. All right, sir. What was the form of the petition that was circulated after this last resolution? Do you recall the general form of the petition?

A. Well, I don't remember the—from memory, I don't recall the exact wording, but it just stated—I'm stating this from memory—that it asked that if they wanted the town council to acquire their own electrical system to be paid for from revenue, strictly revenue courses, the revenue to be derived from the system to retire the debt that would be involved.

Q. Does the City of Tazewell, or do you, have in its possession a copy of this petition?

A. The town has.

Q. Would you file a copy of that showing the form of the wording of the petition as Exhibit 5?

Mr. Ardery: Haven't you got a copy of that with you, Ed?

The Witness: No, sir, the recorder has that.

Mr. Ardery: Let's go ahead, we'll furnish one.

(The petition referred to, to be furnished subsequent to

the taking of this deposition, will be marked as Exhibit No. 5 and filed as an exhibit to this deposition.)

The Witness: You want the petition that was signed?

[fol. 228] Mr. Rowntree: Just the form of the petition is what I want.

Mr. Stanifer: Just the wording?

Mr. Rowntree: That's right.

By Mr. Rowntree:

Q. Do you recall, Mr. Hardin, that Kentucky Utilities Company circulated communications to the people in the area making arguments about this issue, and did you see any of those?

A. You are speaking of what now?

Q. Papers circulated in the area by Kentucky Utilities making arguments concerning this issue of electric service.

A. You mean written statements?

Q. Yes, sir.

A. I don't remember seeing any written statements. They —I remember they had some people to go around and talk to the people.

Now wait a minute. Now you are not speaking of a letter?

Q. Yes, sir.

A. Well, that's—I didn't—my personal opinion didn't construe that to be a petition. I got a letter from them.

[fol. 229] Q. Was this paper here attached to it, do you recall? Was that attached to that letter?

A. I got a letter from the Kentucky Utilities. Of course I got—I believe I got one as just a citizen, and I believe I got one as mayor, a letter stating what they had to say. I don't remember just exactly what they had to say, and—but we have—I believe I gave—the city got one, and I gave it to the recorder, whatever we got, it would be on record, and as to what—I remember the letter, and this was probably—

Q. Do you recall getting a card like that?

A. Yes, sir, I've seen these cards.

Q. Now, did the council discuss these questions that were raised on that card?

A. They probably discussed the things that were on the cards, and talked about it.

Q. Did the council seek a legal opinion, or did the city seek a legal opinion as to the right of TVA to distribute or have distributed power of TVA in Tazewell or New Tazewell?

A. Well, we have—now restate your question, please.

Mr. Rowntree: Read the question.

(The last question was read by the reporter.)

[fol. 230] The Witness: Well, the council is on legal opinion. In other words, we have had counsel all along, and of course they have asked counsel and I have asked counsel their opinions on various aspects of the case.

By Mr. Rowntree:

Q. Was any written opinion on that question submitted to the council?

A. Well now, Mr. Stanifer was at our—a lot of our council meetings, and they asked him question about it, and he gave them his opinion.

Q. Verbally on the floor of the council?

A. Yes, sir.

Q. Was any study made to determine what percentage of the residential customers would be adversely affected by receiving power at the rates charged by Powell Valley Electric Cooperative?

A. You mean if we acquired our own system, would anybody have to pay more?

Q. Yes.

A. Than they are now paying?

Q. Yes.

A. Or than they were paying?

Q. Yes, and what number of customers would be involved?

A. I believe that was discussed, and I believe—I under-[fol. 231] stood it would be a very few that would be affected.

Q. Is that what you were told?

A. No, I wouldn't say I was told. That was in our discussions; we discussed that.

Q. In the council meeting. Did you make any study yourself as to the number?

A. As to the actual number that would be affected?

Q. Adversely.

A. Not make any savings in their power?

Q. That's right.

A. Well, I gave it some thought. I mean I knew, I figured that there would be some that paid a minimum or something like that that wouldn't—probably wouldn't make any savings.

Q. And what number did you come up with that would be affected?

A. I didn't come up with any particular number. I felt it would be a small number, very small.

Q. Is that your feeling or did you make a study?

A. Well, I—you mean just house to house?

Q. Yes.

A. I didn't make that kind of a study, no.

Q. Did you investigate the customer list of Kentucky Utilities?

A. I've never seen a list of Kentucky Utilities.

[fol. 232] Q. Well, did you ask to see it? Did you ask to see these lists of customers that would be affected?

A. No.

Q. Did you determine how much taxes Kentucky Utilities was paying and how much taxes Powell Valley was paying and what the effect on the tax receipts of the county would be?

A. Well that—of course we knew, we had information to know how much taxes KU—Kentucky Utilities was paying and how much Tennessee Valley was paying. Of course as to our part, it was what they were paying in the town and of course the proportion that the town was paying and what they were paying county-wide, we just knew—we checked to see what they were paying in the town.

Q. In the town?

A. In the town. Of course we were told how much they were paying—I mean that information stated, you know, what they were paying overall, in the county, in taxes, and we discussed that, but the fact that what proportion would apply to the town was small in proportion to what the people would save if we could get lower rates.

Mr. McCarthy: Are you going to make that list of questions an exhibit?

Mr. Rowntree: Yes, we will make that Exhibit Number 6.

[fol. 233] (The document referred to was marked for identification as Exhibit No. 6, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now after this petition and the letter of KU to the people of the area, did the towns decide to employ counsel, employ a lawyer to assist them in this project?

A. Now the exact dates of these things, one before the other, I would have to go back to the record to give you that dates and everything. At the city's records to see the dates and things, you know, the things that took place.

Q. Did the towns decide to get a firm commitment from Powell Valley and TVA concerning the supply of electricity?

A. Of course we asked Powell Valley Electric if they could service, and of course we were advised by Powell Valley Electric that they could service our power needs for our own system.

Q. Did you seek a commitment in writing?

A. We got a commitment in writing that they could serve us.

Q. Now who did the towns employ to carry on this legal work connected with the project?

A. We employed Mr. Stanifer and Mr. Ardery.

Q. Who recommended the employment?

A. Well, of course Mr. Stanifer was already our city at-
[fol. 234] torney, and then since it was a case of this nature, we wanted an attorney that knew about our type situation, and I discussed it with Bill, and then Mr. Miner there, I talked to him one day, and he told us of Mr. Ardery, so we got in touch with Mr. Ardery to come down and talk to us, and—

Q. Do you know when he came down?

A. The exact date, I don't remember.

Q. Who prepared the letter to Powell Valley seeking commitment on the supply of power?

A. Well, it was prepared by the town and legal counsel, I mean our attorneys.

Q. Mr. Ardery and Mr. Stanifer?

A. To the best of my memory, knowledge.

Q. Do you know why two letters were written to Powell Valley concerning this?

A. What letters do you have reference to?

Q. I show you a letter dated August 14, 1963, signed by you, which is part of Mr. House's exhibit 23, and also a letter dated September the 11th, 1963, signed by you and Mayor DeBusk, which is part of Mr. House's exhibit 26.

A. This is a letter—these are the two letters?

Q. That's right.

A. That you have asked me about?

Q. That's correct.

A. The letter of August the 14th from the mayor to [fol. 235] Mr. Miner where we advised him that we were going to acquire—acquire or construct an electrical distribution system, this letter as it states was counsel's opinion.

Q. Why was the second letter written after the first letter had gone out? Do you know anything about the reasons why two letters of similar form went out?

A. Well, one is from—is signed by me, and the other is signed by myself and Mayor DeBusk.

Q. Did you participate in any discussions concerning the issuance of the second letter?

A. Well, we discussed it with our attorney.

Q. Do you know whay they wanted you to sign another letter?

A. I don't remember at this time.

Q. All right, sir. Mr. Hardin, I show you a series of letters, starting off with a letter dated August 14, 1963, from Mr. Ardery to Mr. DeBusk, and ask you if you received——

Mr. Ardery: Let me see those, Mr. Rowntree, just a minute, please, sir.

I think this is certainly in the category of evidence that would be objectionable. I don't know that we have any desire to object to it, but I might state for the record here that it seems to me that KU's concern about the right of [fol. 236] the cities to employ counsel might well be met with the concern of the cities as to KU's right to counsel, and simply commenting that it is easily objectionable.

Do we have any objection? Do you have any question about it, Bill?

Mr. Stanifer: No.

By Mr. Rowntree:

Q. I'll ask you, Mr. Hardin, if you received letters similar to those?

Mr. Ardery: Off the record.

(Discussion off the record.)

The Witness: We received these letters.

By Mr. Rowntree:

Q. Mr. Hardin, do you mean that you just saw this letter to Mr. DeBusk, or did you get another letter addressed to you?

A. We got a letter, too.

Q. Like this?

A. Yes. I wouldn't swear it was word for word the same item, but we got a letter from Mr. Ardery of the same nature as that.

Mr. Rowntree: File that as Collective Exhibit Number 7.

(The documents referred to were marked for identification as Collective Ex. No. 7, and filed as exhibit to this deposition.)

[fol. 237] By Mr. Rowntree:

Q. Has Tazewell passed a resolution employing counsel? Do you have a resolution for employing counsel?

A. Yes, sir, we employed counsel.

Q. Do you recall what date that was, Mr. Hardin?

A. Not the exact date unless I go back to the city's records.

Q. That's all right. Now did you later—did the Tazewell Board of Aldermen pass a resolution later on authorizing the establishment of a municipal electric system?

A. They passed a resolution to go ahead and acquire or construct electrical system. We have a copy of that resolution in the city's files.

Q. Do you have that copy of that here?

A. I don't have it with me. The recorder has it, but I don't have one with me.

Mr. Ardery: I think you have made that part of your record where you sued to enjoin the employment of counsel, didn't you? So I think you've got copies of it.

Mr. Rowntree: That was employment of counsel.

Mr. Ardery: That's right, where you've got a separate suit where you are suing to keep them from having counsel, and I think you made that a part of that record.

[fol. 238] Mr. Rowntree: That wasn't me.

Mr. Estep: No, that wasn't to prohibit them from hiring counsel.

Mr. Ardery: I think that was the relief you requested in the lawsuit.

Mr. Estep: Trying to save the taxpayer's money.

By Mr. Rowntree:

Q. Do you recall, Mr. Hardin, whether or not the resolution authorizing the establishment of municipal electric systems for Tazewell was passed at the same time as the resolution on employing counsel?

A. I don't believe it was. Like I say, I'd have to go back to the city's records to give you an exact answer on that. It's a matter of record.

Q. Well, will you supply as Exhibit 8 a copy of resolution of Tazewell authorizing the establishment of the municipal electric system?

A. Where we passed the resolution to go ahead?

Q. Yes.

A. Yes, sir.

Mr. Rowntree: May I ask counsel if they know the date of that resolution?

Mr. Stanifer: I'll have to look it up too.

By Mr. Rowntree:

[fol. 239] Q. Let me ask one more question there. Mr. Hardin, do you recall whether a resolution was passed by the Tazewell Board of Aldermen separate and apart from any resolution passed by the aldermen of New Tazewell?

A. The things we passed, we passed as Tazewell.

Q. And you think there is a resolution by Tazewell authorizing the establishment of an electric system?

A. Our resolutions and motions in the minutes were voted and passed on by council. The exact date, I don't know the exact date. It's been sometime ago.

Q. Was it before or after New Tazewell passed such a resolution, do you recall?

A. I couldn't say.

Mr. Rowntree: And that will be supplied as Exhibit 8.

(The resolution referred to was furnished and marked for identification as Exhibit No. 8, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now if you recall, Mr. Hardin, customers of Kentucky Utilities who started being supplied with power from a Powell Valley source, started receiving service on or about October 30, 1963, is that in accord with your recollection?

A. I believe they were served by the town with power [fol. 240] from Powell Valley Electric.

Q. Yes, sir, starting about that date.

A. About that date.

Q. Now was there any other resolution passed by the town council of Tazewell or the Board of Aldermen of Tazewell after October 30, 1963, concerning this power situation?

A. Not that I remember right now.

Q. Was there any other resolution passed after Exhibit 8, this resolution that you recall was passed concerning power?

A. It was a motion or resolution to issue—give me the authority to issue revenue notes, negotiate revenue notes.

Q. Now you are talking about notes and not bonds; is that correct?

A. Notes.

Q. Now was there a resolution passed to that effect?

A. I believe it was a resolution.

Q. Do you recall the date of that?

A. Not the exact date. I can get a copy of it from the city's records.

Q. Will you supply that as Exhibit 9?
A. Yes.

[fol. 241] Mr. Rowntree: I just wonder if counsel has copies of these two resolutions?

Mr. Stanifer: No, I've looked, and I don't. I did have them, but they have gotten out of file some way or other.

Mr. Rowntree: Does any other counsel have copies?

Mr. Ardery: No.

Mr. Rowntree: Does counsel recall the dates of these?

Mr. Stanifer: No, I don't. We will supply them.

(The resolution referred to, to be furnished subsequent to the taking of the deposition, will be marked as Exhibit 9, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. And is it not true, Mr. Hardin, that starting on or about October 30, 1963, duplicate service was provided for these customers that foremrly were supplied by Kentucky Utilities?

A. The town serviced some customers that formerly were being served by KU.

Q. These were duplicating facilities?

A. Well, we hired contractors to furnish power to those [fol. 242] that requested it.

Q. Now who did the work of installing these facilities?

A. Well, we entered into a contract with Irby Construction Company.

Q. Is that a corporation, Irby Construction Company, or do you know?

A. Just Irby Construction Company.

Q. Where is it located; where is its principal office, do you know?

A. They are out of state, the exact town—

Q. Do they do any other work in Tennessee besides for Tazewell and New Tazewell?

A. I understand they do work, do construction work for Powell Valley Electric.

Q. Did you have a written contract with Irby Construction Company?

A. Yes, sir.

Q. Do you have a copy of that with you?

A. No, sir.

Mr. Stanifer: I have a copy of that.

Mr. Rowntree: Could we see that, Mr. Stanifer? Is that the only copy you have?

Mr. Stanifer: No, you can have that.

Mr. Rowntree: We'd like to file that as Exhibit 10.

[fol. 243] Mr. Stanifer: I might state there might have been some changes on the original. Now these are carbons. I's not sure. I believe this is an actual copy, I don't believe there have been any changes made, but there might have been.

Mr. Rowntree: Well, you can supply a corrected copy.

Mr. Stanifer: Yes.

(The contract referred to was marked for identification as Exhibit No. 10, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. In the construction of this duplicating service to these customers formerly supplied by Kentucky Utilities, Mr. Hardin, who provided the engineering work for that?

A. Well, Mr. Cottrell and House furnished us service on that.

Q. That's the engineering firm in Nashville?

A. Yes, sir.

Q. That's the same Mr. Cottrell that talked to the counsel about an appraisal?

A. Yes, sir.

Q. Of Kentucky Utility property?

A. Yes, sir.

[fol. 244] Q. Did they do any work for Powell Valley, Cottrell and House, do you know?

A. I understand they do.

Q. Did Cottrell and House have a man in the field here to direct the engineering work?

A. Yes, sir.

Q. Who was that, do you recall?

A. I believe his first name was Pat; I don't recall his last name.

Q. Do you know anything about Pat, who he is or who he worked for?

A. Well, I knew he worked for Cottrell and House.

Q. Was he here for any period of time?

A. Well, he was here when the construction work was going on.

Q. When was that work going on?

A. Started along about October the 30th.

Q. And how long did it go on?

A. Let's see, just a few days.

Q. And then——

A. Just a few days.

Q. Did this fellow Pat leave at that time after those few days?

A. I don't remember when he left.

Q. Well, did Irby Construction Company work for just [fol. 245] a few days?

A. As far as I know, yes, they worked just a few days for the city.

Q. Approximately how long?

A. Six or seven days, I guess.

Q. And did Irby Construction Company leave at that time, did they do any more work for Tazewell?

A. Not that I remember at that time.

Q. Well, did they do any more work later on for Tazewell?

A. Not that I remember right now.

Q. And Cottrell and House did no more work for Tazewell after those few days?

A. No.

Q. Did you have a written contract with Cottrell and House?

A. For that work?

Q. Yes.

A. No, sir.

Q. Have you received a bill from Cottrell and House?

A. Yes, sir.

Q. Have you paid it?

A. No, sir.

Q. Do you recall how much that bill is, Cottrell [fol. 246] and House?

A. I'd just have to—I couldn't tell you the exact figures. It's around $800.00.

Q. Now this contract, Exhibit 10, I believe, provides that

all materials would be furnished by Irby Construction Company.

Who owned the material after it was installed? Did the town of Tazewell own the——

A. You mean the poles that were set?

Q. That's right, and the service lines.

A. The poles and the service lines would belong to the town.

Q. What about the transformers that were required?

A. All the material that they used would belong to the town, I mean in this construction.

Q. What about the meters? Would they belong to the town too?

A. I would say that they would belong to Tazewell.

Q. Now did Tazewell enter into a contract with Powell Valley Electric Cooperative for the supply of power?

A. No, we haven't entered into no contract other than that they would furnish us the power which they did.

Q. Other than these commitments that we have talked about before?

A. The information you have.

[fol. 247] Q. And these letters. You have no written contract with Powell Valley?

A. Not at this date.

Q. Do you have any verbal contract with Powell Valley, verbal agreement of any sort, besides that they would supply the power?

A. In other words, we asked them if they would furnish power, and they said they would, and of course we have, like you say, in the papers here that their commitment that they would furnish us power and which they did.

Q. You have no agreement with them as to what they will charge for this power?

A. In other words, we get it—it's my understanding that we get it at the block rate.

Q. What do you mean by that?

A. That would be the—the wholesale rate. In other words, what it comes in to—the volume.

Q. Do you know how much Powell Valley gets for the —I mean net to itself for the power it supplies to Tazewell?

A. They agreed to just—in dollars and cents, I couldn't

say. In other words, they furnish the power, they agreed to handle the collections and deposit to the city less a nominal charge for the handling of that collection for the city at this time. We have on our applications for power, we [fol. 248] know what our customers will be charged.

Q. Is this the kind of agreement that you make with your customers?

A. This is the agreement that they make their request on and sign.

Q. And does that set forth the rate that is charged the customers?

A. The rate that the city uses.

Mr. Rowntree: We file that as Exhibit 11.

(The document referred to was marked for identification as Exhibit No. 11, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now looking at that exhibit 11, Mr. Hardin, do you have any idea how much of that rate Powell Valley keeps as net to itself for supplying the power?

A. In exact dollars and cents, I don't know.

Q. Well, can you give us some idea?

A. No.

Q. Any understanding that you have with Powell Valley, verbally or written, as to anything else that Powell Valley will do with respect to your system besides supply power?

A. Just like I've stated, they said they would supply power which they are doing, and that they would—at the [fol. 249] present time they would handle the billings and collections of it for the town, in the name of the town, less the cost of power, the difference would go to the town for the time being.

Q. Now when a new customer calls in for service, who does he call?

A. Well, he can, as far as contacting the town, he can contact any member of the council or the mayor and make an application for power. Some have got applications, and I guess some of them haven't. Some of them rather not fool with it, be bothered with it.

Q. Has the town established a power board?

A. Well, we haven't established—you mean like a utility board?

Q. Right.

A. In other words, I wouldn't say that we have officially established a power board. I would just assume that it would be the town.

Q. They haven't set forth a resolution which they specifically designated themselves or anybody else the power board?

A. Not as a power board.

Q. Are there any minutes of the council kept separate and apart from the regular minutes of the council wherein they meet separately as a board?

[fol. 250] A. All of our minutes are public record, and the record keeps everything down that goes about, and it's a matter of public record.

Q. All right, sir. Does the city employ any personnel for its municipal electric system?

A. Right now we don't have any employees of the municipal electrical system. In other words, they can call the councilmen or myself and request an application for power, and of course we know what the applications say. It's—in other words, they ask for it.

Q. All right, have you gotten any such calls as that yourself?

A. I've had people come in and ask me to give them an application, say I want to make application for service from the city when it's available.

Q. What do you do when you get the applications signed by the individual?

A. I turn them over to the recorder and he files them.

Q. Is that the end of it?

A. Keep them on record.

Q. Well, you don't do anything about the new application?

A. Well, not particularly, because it says in the application that as soon as such service is available.

[fol. 251] Q. What about any customers that have been supplied in the period since October 30, 1963? Who handled those applications?

A. Well, of course when we first started, we were flooded with applicants for applications. We had plenty of them,

people coming in and seeing some of the councilmen wanting an application and coming by and asking me for applications, so they could fill them out.

Q. Well, what was done with the applications after they were signed?

A. Just like I said a few minutes ago, they were turned over to the recorder for the city's records.

Q. Well, something had to be done besides filing them with the recorder if they were going to be given service, and some of them have been given service. Who handled them? What was done with them? Or what communication was made to whom in order to get the service established?

A. Well, at the present time, there's not anything particularly done with them, because we are not making any changeovers, if that's what you want to call it.

Q. Well, you have in the past six or seven months, haven't you, made some connections to new customers, or do you know?

A. The past six or seven months. There might have been. All I can think of offhand, there's one place that might [fol. 252] have been changed over—but I don't think—you couldn't say it would be changed over. They didn't have any power connections at the time. It was disconnected, and the owner requested—I mean I don't know whether they disconnected it or not, but they wasn't receiving any power, and the owner asked if the city could service them, and it was close to a pole, and the city serviced them, and I believe that's been since the initial service started.

Q. Where was that and who was the customer?

A. I believe that was Mr. Brooks over at the cabinet shop for his service station.

Q. Did he sign one of these applications?

A. He made application.

Q. Was this a commercial service or residential service?

A. Commercial, service station.

Q. Do you have a separate form for commercial?

A. We have a form for commercial, and a form for residential.

Q. And did he sign the commercial form, or do you know?

A. I would say he signed the commercial form. I couldn't state for sure.

Q. All right. What was done with that application after it was signed?

[fol. 253] A. It was put in the city's files. I assume that they are all there. I might have a few down at the office where I haven't given them to the recorder, but as far as I know, they are all in the file unless they have been misplaced or lost or something, but I wouldn't think there were.

Q. Well, that wasn't the end of the matter. Somebody connected up his line. Now who did the information get to in order to get the work accomplished?

A. He come and requested——

Q. Who did the work?

A. Good gracious. Well, I wasn't there when the work was done, and I couldn't say who did the work, who the individuals were.

Q. Well, did Powell Valley Electric Cooperative do the work?

A. They furnished the power.

Q. Well, did they make the connection?

A. Like I say, I wasn't there when it was hooked up.

Q. Well, you are the head of this municipal power system, don't you know who is making the connections, installing the service facilities for these new customers?

A. We talked it over with Mr. Stanifer on that one, I believe, and it was considered that it was all right. Now it might have been that the city hired—I know we hired—[fol. 254] the city hired personnel to do the work. It could have been somebody that worked for Powell Valley Electric. I couldn't say.

Q. So you did talk to Mr. Stanifer?

A. Yes.

Q. How do you spell that name?

A. Stanifer.

Q. You did talk to Mr. James Stanifer?

A. No, Bill Stanifer.

Q. Who is this other Stanifer who works for Powell Valley?

A. That's Sandefur.

Q. You didn't talk to him?

A. I talked to him every once in a while, but I don't remember particularly talking to him about that.

Q. Who is head——

A. When the city has problems arise, in other words, we go to our attorneys and ask their advice on it.

Q. Well, do you go to them each time a new customer is given service?

A. I would say that everything that we have done, we have talked to our attorneys about it.

Q. And does he take care of it?

A. Well, he helps.

Q. Is there anybody else that takes care of it besides [fol. 255] him to your knowledge?

A. Of course I'm sure—Mr. Stanifer is local and Mr. Ardery is in Louisville, and I'm sure he converses back and forth with Mr. Ardery.

Q. Is this a joint municipal electric system between Tazewell and New Tazewell?

A. Well, we are working together on it.

Q. Any resolution which makes it a joint system?

A. Well, I couldn't say. I'd have to go back to the record to see. I don't remember that.

Q. Well, will you supply as Exhibit 12 any resolution that makes it a joint system?

A. That is if we have it.

Q. Yes.

A. On record.

(The resolution referred to, if located, to be furnished subsequent to the taking of this deposition, marked for identification as Exhibit No. 12, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Mr. Hardin, are you familiar with the service that has been installed in the past six or seven months?

A. What type service are you speaking of?

Q. I'm talking about service to residences, commercial [fol. 256] places or industries in Tazewell.

A. You mean to KU's customers?

Q. No, to any new customer of the Tazewell municipal electric system.

A. Yes, sir.

Q. And where are—how many new customers have you had since Irby Construction Company left, quit working?

A. Well, we run service just back of this, just down the highway this side to a new building down here and a new building over here on the corner.

Q. All right. Now who did that work?

A. We contacted Powell Valley Electric and asked them if they could do the work for us, and pay them for it, and they said they would.

Q. And does your father own one of those buidlings?

A. Yes, sir.

Q. Did Powell Valley bill you for that work?

A. They haven't sent us a statement for it yet; they will, I'm sure.

Q. Is that to be part of the municipal electric system, or is it now?

A. It's part of the municipal electric system now.

Q. Do you recall any other construction furnishing new facilities in Tazewell since Irby Construction Company left?

A. No new facility that I know of.

[fol. 257] Now has Tazewell paid the bill to Irby Construction Company?

A. We have paid some of it.

Q. How much was the bill?

A. Tazewell has issued a revenue note for—I can't give you the exact dollars and cents, I don't remember right now—for some of the construction work, and for payment to some of the—and to travel and out-of-pocket expense to the attorneys, and the Tazewell part was two thousand dollars.

Q. Now this was revenue note that was authorized by Exhibit 9 which you are to supply, a resolution?

A. Yes.

Q. Which was authorized in that?

A. Yes.

Q. Now who was this note issued to?

A. The exact wording, I'd have to look at a copy, but—as to how it reads.

Q. What bank was it issued to?

A. I don't believe it was issued to a bank.

Q. Who bought the note? Who paid the proceeds of the note?

A. The note was given to Powell Valley Bank at Jonesville.

Q. And did Powell Valley Bank at Jonesville, Virginia, [fol. 258] set up a deposit in favor of Tazewell?

A. The Tazewells.

Mr. Stanifer: I'll show him that to refresh his recollection. I don't know if that's the same one or not that was executed, but it's a copy of one.

The Witness: Now Tazewell—now here it's issued to the Powell Valley National Bank of Jonesville, Virginia.

Mr. Rowntree: May I see that?

The Witness: That's for Tazewell's part.

Mr. Rowntree: I'll ask to file that—may we file this copy?

Mr. Stanifer: Yes, you can have that. I can get another copy. I don't know if that's the only one I have or not. That's all right, you can have it.

Mr. Rowntree: File that as Exhibit 13.

(The document referred to was marked for identification as Exhibit No. 13, later found to be copy of an unexecuted note, and correct copy was substituted, marked for identification, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now will you state, Mr. Hardin, just what you know about the issuance of that note and the transaction that [fol. 259] took place concerning that note there? Who presented the note to you and who took it, and——

A. Well, our attorneys prepared the note and it was sent to the town—I mean they were given to the town after the type of the meeting that we would finance the system on that basis, and of course—

Q. Did you present the note to the city council?

A. Yes, sir, they saw—they—that is—we had a copy of the note and things for the council to see on the basis that it would be issued.

Q. And did you get a resolution authorizing the signature on the note in this Exhibit 9 that is to be supplied?

A. As council authorized me to execute the note.

Q. Is that contained in the minutes?

A. The resolution would be in the minutes.

Q. And did you take the note to the bank in Jonesville?

A. Well, of course we took the note to Mr. Stanifer.

Q. And what is the next—

A. And then we got the type note and then counsel handled the handling of the note. When I speak of counsel, I mean the city attorneys, and they arranged for the handling of the note, and I did go with them when they took the notes up to the bank in Virginia.

[fol. 260] Q. In Virginia?

A. Yes.

Q. And did they give you a deposit slip?

A. Yes, deposit slip to the recorder.

Q. And then did you get—did you have a bill from Irby Construction Company which you paid from that deposit?

A. Yes, and a statement of up-to-date expenses from the attorneys.

Q. Now on this electric system, who reads the meters?

A. Powell Valley Electric is taking care of that for us now.

Q. Who does the routine service work for—when there's an outage or anything like that?

A. I don't know that we have had an outage.

Q. Have you had any necessity for any routine work?

A. Not that I remember.

Q. Who would do the work if you had one?

A. Well, if it was a major outage and we are getting our power from Powell Valley Electric, they would be the one that we would call on to see if they could get the juice back on.

Q. And I understand you testified that Powell Valley also does the billing of customers?

[fol. 261] A. They are handling that for us now.

Q. Well, when the Powell Valley—who collects the money from the bill?

A. They handle the collection and deposit to the city.

Q. Where is the bank account kept where that money is deposited?

A. Powell Valley Bank in Jonesville.

Q. And does Powell Valley render an account to you?

A. Yes, sir, I have received two of them, and I turned them over to the recorder.

Q. Is that a public record?

A. I would think so; I imagine it would be.

Q. Well, would you supply as Exhibit 14 a copy of those accounts?

Mr. Pedersen: Copies of what?

Mr. Rowntree: The accounts rendered by Powell Valley to Tazewell.

The Witness: Those that we have?

Mr. Rowntree: Yes.

Mr. Stanifer: Copy of the accounts?

Mr. Rowntree: Pertaining to the money received and the disposition.

[fol. 262] (The document referred to, to be furnished subsequent to the taking of this deposition, will be marked for identification as Exhibit No. 14, and filed as an exhibit to this deposition.)

By Mr. Rowntree:

Q. Have you paid this loan from the bank, or is it still outstanding?

A. It's still outstanding.

Q. Have you paid any part of it?

A. No, sir.

Q. Now what is the ultimate plan of the city of Tazewell, Mr. Hardin, as to this Tazewell municipal electrical system? Can you state what the ultimate goal is? Is it to take over all of the municipal service in Tazewell?

A. Well, we would like to acquire our own system and have our own people—all the people in the city served by the municipal system, and of course that's the way to get lower rates.

Q. Do you plan to issue bonds ultimately?

A. Well, that hasn't—right now we just issue revenue notes, and that would be decided by the city council. It's to come up in the future, and it would be up to their decision, is the way I see it.

Q. Do you have any understanding with Powell Valley [fol. 263] as to the acquisition of power facilities in the city ultimately?

A. You mean—how do you mean that?

Q. It's true, is it not, that Powell Valley has certain facilities in Tazewell?

A. Yes, sir, they have facilities.

Q. Do you have any understanding with Powell Valley at this time as to the acquisition of those Powell Valley facilities by the Tazewell municipal electrical system?

A. You mean to acquire their system?

Q. Yes, inside of Tazewell.

A. No, we haven't had anything to acquire theirs at this time.

Q. You haven't even thought about, is that right?

A. I don't know what council's feelings are going to be later on.

Q. The only facilities you are driving for now is the Kentucky Utilities facilities, is that right?

A. Well, in trying to get cheaper power for those that's not already got cheaper power.

Q. And you don't care whether it's Powell Valley that supplies it or Tazewell Municipal system?

A. Well, we are going—whether the city council may decide later that they want to acquire their system inside of the city, I don't know.

[fol. 264] Q. Do you know why Powell Valley has not actually extended its service in Tazewell rather than having the Tazewell municipal system do it? Do you know the reasons for that?

A. All I know is that we have a right to—the city has a right to establish their own system and furnish its own customers, but I don't quite understand your question.

Mr. Rowntree: That's all.

Further Deponent Saith Not.

Edward J. Hardin, III, by: Georgella Mankin.

Sworn to before me this the 19th day of August, 1964.

Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal).

[fol. 265] JAMES B. DEBUSK, one of the Defendants, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?
A. James B. DeBusk. James Billy.
Q. How old are you, Mr. DeBusk?
A. Thirty-three.
Q. Where is your residence?
A. New Tazewell.
Q. What business are you in?
A. I'm in the florist business and the mayor of New Tazewell.
Q. How long have you been mayor of New Tazewell?
A. Soon be four years.
Q. Let's see, that would put it back to 1960?
A. Took office January the 1st, 1961.
Q. '61?
A. Yes, sir.
Q. And you are still in office?
A. Yes, sir.
Q. Is New Tazewell incorporated under the general municipal law of Tennessee, or do they have a special charter passed by a special act of the legislature?

[fol. 266] Mr. Stanifer: We'll stipulate it's the same as Tazewell.

Mr. Rowntree: All right, incorporated under the general law?

Mr. Stanifer: Yes.

By Mr. Rowntree:

Q. Do you have an ad valorem tax levy in New Tazewell?
A. No, sir, we don't.
Q. Where do you derive your funds to operate the municipality?
A. Comes back from the state on the gas tax, sales tax, and beer tax.

Q. And do you issue licenses for building permits?

A. We've got building permits, and we have the city privilege license.

Q. Those are your main sources of revenue?

A. Yes, sir.

Mr. Pedersen: Permits and what else did you say?

The Witness: Privilege license.

By Mr. Rowntree:

Q. Mr. DeBusk, did you make a study of the customers of Kentucky Utilities in New Tazewell to determine whether or not some of them would be worse off or no [fol. 267] better off with Powell Valley rates of electricity?

A. I can fore-state to start with that this power business has been an issue in the town areas for some time. We got several customers that's on REA power and customers on KU, and maybe one on one side of the street and one on the other side.

Q. Now I asked you if you made a special study about the specific customers of Kentucky Utilities, particularly as to the number that would be better off or that they would not be better off with Powell Valley rates?

A. I couldn't definitely say there would be any any better off with the—I mean, excuse me—I couldn't definitely say that there would be any hurt with Powell Valley rate.

Q. Well, did you make a study to determine that?

A. No, sir.

Q. Now I believe that New Tazewell passed a resolution, did it not, asking for a referendum or providing for a referendum to the people on the question of providing power from another source than Kentucky Utilities?

A. Yes, I can say the people and I can clear myself by justifying them and say I was one reason that I would like to have a referendum or a petition carried to get the feeling of the people to know that I was on the sound foot, that I got the majority of the feeling of the people, because it's [fol. 268] been an issue, and I've heard it thrashed back and forth, and I wanted to get it cleared to satisfy myself.

Q. You were an elected officer of the city, and you wanted the people to——

A. I wanted to give them—

Q. To decide this?

A. That's right.

Q. In any of these meetings with the TVA and Powell Valley that you attended prior to May of 1963, was any discussion given to you by TVA or by Powell Valley that you go to the people with this issue?

A. We had some two or three meetings with TVA, and we have asked Powell Valley Electric Co-op, we wasn't interested in what kind of—who served us with power, whether it would be Powell Valley, Lafollette Power and Light Company, or KUB. The only thing we was interested in was to satisfy the people, get them cheaper rates, because we was a distressed area, we've been trying to get factories and things in here, factories, and we had one factory threaten, if they didn't get cheaper power, they was going to have to pull out and leave us.

Q. Now whose idea was it to have a referendum on this question?

A. As I say, we thrashed—we went to TVA some two or three times, and they wouldn't give us no answer at all, [fol. 269] said they wasn't in position, and they couldn't give us any answer on it, and so we called Mr. Puett from Tennessee—he's a league that we pay—the city pays for his advisory, and he gave us a lead that there was two routes that we could take. We could either have the election or have a referendum on—I believe it was Title 6, Chapter 13 of the Public Tennessee Acts.

Q. Is it not true that prior to this meeting with the representative of the Tennessee Municipal League that some forms of resolution were discussed between you and Powell Valley and TVA?

A. Yes, we discussed some forms, I'd say.

Q. Was there any mention made with respect to submitting it to the people?

A. Well, we discussed which way would be the reasonableness on the people, we was going to have to call a general election, it would have been a—would have been somewhat higher on the people, and we wasn't satisfied, as I can say myself, where the people would come out and attend an election, and where we could have the sentiment of the people. We wanted to make definitely that if it was possible the we could get every signer that we could for

the thing. I mean that they'd have their voice of opinion, they could either vote for it or against it.

Q. Now did Mr. Miner attend meetings of the council [fol. 270] of New Tazewell at the time that New Tazewell decided to submit it to a petition rather than a referendum?

A. Definitely I couldn't give a definite answer. He attended some meetings at our request, at the city's requestion, I can say that, but on this occasion, I couldn't tell you definitely.

Q. You don't recall that he was present the day that the council decided to——

A. I couldn't definite, no, sir, I couldn't, because we met with Mr. Miner, he attended some meetings with us, and also we had Kentucky Utility represented at the meeting with us. We didn't have a thing hid from nobody. We was just trying to find a way that we could obtain our own power system, and be in the rights, in the legal rights.

Q. I believe New Tazewell employed Mr. Ardery and Mr. Stanifer?

A. Yes, sir.

Q. The same as Tazewell did?

A. That's right, yes, sir.

Q. Did you pass a resolution employing counsel somewhere in August of 1963, or do you recall that particular question?

A. I believe that we did. I know we passed the city—the city council of New Tazewell passed a resolution authorized me to go ahead and act on the chapter and the title [fol. 271] that we was acting on. Of course I went back to them sometimes to refresh them on what we was doing and keep them up to date.

Q. Mr. DeBusk, do you recognize that as being the resolution authorizing the establishment of a municipal system?

A. Yes, I will.

Mr. Rowntree: We will give you an opportunity to correct that if there needs to be any correction. We'd like to file that as Exhibit 1.

The Witness: Looks like a vote was taken here, five yes and one no. I suppose that's ours.

(The resolution referred to was marked for identification as Exhibit No. 1, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Will you supply a copy of your petition that New Tazewell put out to your people on this issue as Exhibit No. 2?

A. I sure will. You mean the heading of it?

Q. That's right.

A. I sure will.

(The petition referred to, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 2, and filed as exhibit to this deposition.)

[fol. 272] By Mr. Rowntree:

Q. Now was there any other resolution passed by the New Tazewell Board of Aldermen after that Exhibit 1 dealing with the power question?

A. There could have been; I won't definitely—

Q. Will you file as Exhibit 3 any resolution subsequent to that one concerning the power question?

A. We will, what we have.

(The resolutions referred to, if any, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 3, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now that Exhibit 1 is the one that authorized the establishment of the municipal system, is that not right?

A. That authorizes us—this Exhibit 1 here?

Q. Yes.

A. That states out there the chapter and the code that pertains to it.

Q. That is the one that authorized the establishment?

A. That's the one we are working on, yes, sir.

Q. Was there any that authorized it prior to this one?

[fol. 273] A. There could have been; I couldn't say definitely.

Q. Well, if you will supply as Exhibit 4 any resolution that authorized it prior to this one.

A. All right.

(The resolutions referred to, if any, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 4, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now did you have considered by your council or board of aldermen the question of issuing revenue notes in connection with the power system?

A. Yes, I believe the chapter sets out that we are entitled to issue revenue notes.

Q. Do you recall that your council took specific action with respect to the issuance of revenue notes?

A. I can't recall—they gave me authorized authority to work out and follow through on the chapter, on Title 6, Chapter 13, of the Tennessee Code Act.

Q. By this Exhibit 1, is that what you are talking about?

A. Yes.

Q. Well, do you recall any other specific action of the [fol. 274] council with respect to the issuance of revenue notes of the power system?

A. I couldn't say that definitely.

Q. If you find any, will you file that as Exhibit No. 5?

A. Yes.

(The resolution referred to, if any, to be furnished subsequent to the taking of this deposition, will be marked as Exhibit No. 5, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Will you state whether or not New Tazewell issued revenue notes with respect to the municipal system, power system?

A. Yes.

Q. Was that issued to the Powell Valley Bank at Jonesville, Virginia?

A. Yes, sir.

Q. Was this a note separate and apart from any note issued by Tazewell?

A. I couldn't say definitely.

Mr. Stanifer: We can stipulate it is the same as the Tazewell anticipation of revenue note.

Mr. Rowntree: Will you stipulate that it is a separate [fol. 275] note?

Mr. Stanifer: Yes.

Mr. Rowntree: Is it in the same form?

Mr. Stanifer: Yes.

Mr. Rountree: Stipulated it's in the same form as Exhibit 13 to Mr. Hardin except that it is for the City of New Tazewell, and it's executed by the mayor of New Tazewell, is that agreeable?

Mr. Stanifer: I think I have one.

Mr. Rowntree: Well, if you've got one, that would be better.

Mr. Stanifer: It is the same form. We will stipulate it is.

Mr. Rowntree: Do you recall if it is the same amount?

Mr. Stanifer: Now these are some that were typed and never executed. What is the date of this one? Is this the one that's filed as Exhibit——

Mr. Rowntree: That's Exhibit 13.

Mr. Stanifer: Now for the purpose of the record, this one dated the 21st of February, may have never have been executed. Several have been prepared but some of them have been executed. Now here's one dated the 16th day of January, '64, in the amount of $1202.81, and I'll have to check with the recorder to find out if this is the one that was [fol. 276] executed by the City of New Tazewell and the City of Tazewell, but both were in an equal amount.

Mr. Rowntree: This is filed——

Mr. Stanifer: This one is the——

Mr. Stanifer: This one is certified to by Tazewell, so that should be in the place of 13. This one is certified to. So these two are the ones that were actually executed.

Mr. Rowntree: Suppose we substitute at this time this note for the old Exhibit 13, so there won't be any confusion.

Mr. Cridlin: Is this supposed to be a copy of it?

Mr. Stanifer: This is a certified copy by the recorder.

Mr. Ardery: Was that in the same amount?

Mr. Stanifer: No, they are different amounts. The one actually filed as 13, actually the amount is in error, I think. So this is the correct amount.

Mr. Pedersen: $1,202.81, that's for both?

Mr. Stanifer: That's for each town.

Mr. Pedersen: Tazewell and New Tazewell.

Mr. Stanifer: Yes.

Mr. Pedersen: Both for the same amount, is that it?

[fol. 277] Mr. Stanifer: Yes. Oh, there might be one penny in there.

Mr. Pedersen: Now off the record.

(Discussion off the record.)

Mr. Rowntree: Now this is the New Tazewell note in the same amount of $1,202.81, which we would like to put in as Exhibit 6.

(The note referred to was marked for identification as Exhibit No. 6, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Is that the only note that's been issued, Mr. DeBusk, by New Tazewell?

A. Yes, as far as I know, yes, sir.

Q. Is this a single system or is it a double system, or what kind of a system is it? A unified system between Tazewell and New Tazewell, or does each town have its own system?

A. Well, each town has its own system, but we are working together on the system as we did on previous occasions on different systems that we have conducted in this area.

Q. Did New Tazewell have a contract with Irby Construction Company for the construction of facilities?

[fol. 278] A. Yes, sir, I think they did.

Q. Can you file a copy of that as Exhibit 7?

Mr. Stanifer: I believe this does take all of my copies.

Mr. Rowntree: Is it the same form——

Mr. Stanifer: It's the same form. I might add that the original may show some corrections. These are copies that I have in my file, and as far as I know they are accurate to the best of my knowledge, but there could have been some corrections made on the original.

Mr. Rowntree: Well, this contract of New Tazewell is in the same form as the contract with Tazewell which is Exhibit 10 to Mr. Hardin, except the name of the town and the mayor changed?

Mr. Stanifer: That's correct.

Mr. Rowntree: And if there is any correction, you are privileged to make the correction, is that satisfactory?

Mr. Stanifer: Yes.

Mr. Ardery: Are you marking that as exhibit or are you simply letting the record show that it is in the same form?

Mr. Rowntree: Same form.

Mr. Ardery: All right.

[fol. 279] By Mr. Rowntree:

Q. Now did you have a contract or agreement with Cottrell and House for the engineering work on the power project?

A. I think all we had was an oral contract with him. We had talked to Mr. Cottrell and House on previous meetings before.

Q. And have they submitted a bill for their services?

A. Yes, sir.

Q. How much is that bill?

A. I believe it's around eight hundred dollars.

Q. Is that in addition to the eight hundred dollars that Mr. Hardin mentioned or is it the same eight hundred?

A. I believe it's the same eight hundred.

Q. Has that been paid?

A. I don't believe it has.

Q. Were you acquainted with the connection or relationship with Irby Construction Company and Cottrell and House to Powell Valley Electric Cooperative so far as their being a contractor and engineering firm respectively for the cooperative?

A. I don't believe I got hardly—separate your question.

Q. Did you know that Irby Construction Company was [fol. 280] doing contract work for Powell Valley Electric Cooperative at that time?

A. I knowed that they was a contractor in this area at that time doing contracting work.

Q. Did you know it was Irby Construction Company?

A. Yes, that was his name—of the contractor when we talked to him.

Q. Did you know that Cottrell and House was the engineering firm for the Powell Valley Electric Cooperative?

A. I knowed that they had done some work for them.

Q. How long was Irby Construction Company on the job here for the City of New Tazewell?

A. I'd say on the whole cutover, both towns, four or five days, I'd say.

Q. Did they do any work after that?

A. Not in my city.

Q. Did Cottrell and House do any work after that?

A. Not to my knowledge.

Q. After the revenue—the revenue note, Exhibit 6, was issued, did the Jonesville bank establish a deposit in favor of New Tazewell?

A. I believe it was Tazewell and New Tazewell.

Q. Was it a joint account?

A. I couldn't say definitely.

Q. Did you sign a draft on that account to pay the bill [fol. 281] of Irby Construction Company?

A. I couldn't say definitely.

Q. You don't remember signing any check or draft on that account?

A. I couldn't say. The recorder might could. I couldn't say.

Q. Well, you don't recall of drawing any check or draft on the account established in the Jonesville bank?

A. Can't recall, can't recall. I wouldn't say definitely yes or no.

Q. Now with respect to New Tazewell's power system, what did that system consist of after the improvements were made? As of today, what does that system consist of?

A. You mean how many or——

Q. What is the nature of the system? Does it have any major transmission lines, substations or anything of that nature?

A. No. No.

Q. Does it consist entirely of service lines?

A. Service lines, that's right.

Q. And you have transformers on some of your poles?

A. Yes, sir.

Q. And your drop service lines to the houses?

A. That's right. That's right.

Q. What was the longest service line that Irby Construc- [fol. 282] tion Company constructed for you, how many poles would have been involved?

A. I'd say three or four poles.

Q. And where were these service lines connected to draw their power from? Were they all connected to Powell Valley's system?

A. Yes, that's right.

Q. And was each service line separately connected to Powell Valley's system?

A. Each——

Q. Service line. There was no single line of Powell Valley servicing all of these service lines by one connection?

A. No, I don't think so.

Q. And after Irby Construction Company left, have you had any additions to your system?

A. No, we have had—I have had some several—the fact of the matter, if we had served everybody that wants on our system, it wouldn't be—it would all be in New Tazewell's system.

Q. Well, I didn't ask you that. I asked you if you had had any additions to your system.

A. No.

Q. After Irby Construction Company left.

A. No, we haven't.

[fol. 283] Q. Do you know if Powell Valley Electric Cooperative has extended services to any additional customers in New Tazewell since Irby Construction Company finished its work for you?

A. Extended any service to anybody in New Tazewell?

Q. Since Irby Construction Company——

A. For the city?

Q. —left your employment? No. I asked if Powell Valley itself had extended any service?

A. They could have.

Q. Do you know of any specific instances?

A. I think probably they extended to the ASC office which was right adjoining their line in the area where Judge Estep here lives, and the Farm Bureau, I think it is in the same area as Judge Estep.

Q. And that is the Powell Valley service line was extended there, is that correct?

A. They are in that part of the town.

Q. And they are servicing some new customers and

dropped some new service drops in that area since Irby Construction Company finished its work for you?

A. I think so, they have.

Q. Do you consider that part of the New Tazewell municipal power system?

A. Well, yes, it could be. It could be, yes, sir.

[fol. 284] Q. Well, do you know whether or not bills are being collected on an account for New Tazewell from those customers?

A. I couldn't tell you.

Q. You can't say?

A. No, sir.

Q. Now when routine service is required on New Tazewell's system, who does the work?

A. As far as I know, we haven't had any troubles, no routine service.

Q. Do you have any personnel employed by the city to take care of such service?

A. No, sir, we don't.

Q. Who reads the meters?

A. Powell Valley Electric Co-op.

Q. Has Powell Valley Electric Co-op constructed any service for any new customers for the New Tazewell power system?

A. I couldn't say whether they have or not. No, they haven't as I know of. They may have a change. I can't recall whether they—there was one home that was moved, and I believe they made a change and left them on the same power. I couldn't say whether they did or not definitely. I couldn't say.

Q. Who does the billing of customers for you?

[fol. 285] A. Powell Valley Electric Co-op.

Q. Do you have any employees at all of the city in connection with the power system?

A. We have our attorneys.

Q. Anybody besides attorneys?

A. No, sir.

Q. And does Powell Valley place the collections made from the system in the Jonesville bank?

A. Yes, sir.

Q. To your deposit?

A. Yes, sir.

Q. Do they render accounts to you?

A. Yes, sir.

Q. Could you file as Exhibit 7 a copy of the account rendered to you by Powell Valley?

Mr. Stanifer: Now you are speaking about the Powell Valley Bank?

Mr. Rowntree: That's right, the collections.

Mr. Stanifer: There's a distinction there.

Mr. Cridlin: What are you talking about, the bank or the co-op?

Mr. Rowntree: I'm talking about the co-op.

The Witness: The bank or the co-op?

Mr. Rowntree: Co-op.

The Witness: The bank hasn't sent me a statement.

[fol. 286] By Mr. Rowntree:

Q. Has Powell Valley sent you a statement of accounts?

A. No, Powell Valley doesn't, but the bank does.

Q. Is this a simple bank statement showing deposits and withdrawals?

A. It shows the accumulation dividend that we draw off of our customers inside the corporation, city.

Q. Now you say dividend or just the amount deposited from collections. Is that what you mean?

A. Well, that shows us the profit.

Q. You mean the bank takes the deposits, shows the deposits on this statement and does it show—

A. Shows the accumulations, what we accumulate.

Q. Does it show the nature of each withdrawal from the account?

A. I couldn't say.

Q. Well, I'd like for you to file that account whether it be from Powell Valley or from the bank or both as Collective Exhibit 7, if you will.

(The accounting referred to, to be furnished subsequent to the taking of this deposition, will be marked for identification as Exhibit No. 7, and filed as an exhibit to this deposition.)

[fol. 287] By Mr. Rowntree:

Q. Now that's the only information you have as to the finances?

A. Yes, sir.

Q. Of the New Tazewell electric system?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now who is operating the system?

A. Operating our system?

Q. Yes, sir.

A. Of course it's the city's system, City of New Tazewell, and Tazewell, but the Powell Valley Electric Co-op does the mainest work and reading and they are billing for us. Of course I suppose that we could use anybody that we want to in that if we followed through on this Chapter 6, Title 13, of the Public Acts.

Q. Well, you say you suppose that you could use anybody. Have you gotten a legal opinion from counsel on that?

A. I think the city could hire anybody they wanted to. I think it's entitled to it.

Q. By any agreement that you might make?

A. By any agreement that the city would make, I'd think. They'd give them authority to hire—if they hire anybody to operate and to maintain their system, if they——

[fol. 288] Q. Well, of course you are the principal executive officer of the city, I take it, and you would be the one to make the contract.

A. That's right.

Q. Under this authorization.

A. Of the council.

Q. Of the council, which is Exhibit 1, is that right?

A. Yes, sir, one.

Mr. Rowntree: I believe that's all.

(Discussion off the record.)

Mr. Ardery: All of these answers, of course, are subject to objection at a later time for materiality, relevancy and competency.

Mr. Rowntree: That's all. Thank you very much, Mr. DeBusk.

Further Deponent Saith Not.

James B. DeBusk, By: Georgella Mankin.

Sworn to before me this the 19th day of August, 1964.
Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal).

[fol. 289] WILLIAM R. STANIFER, a witness of lawful age, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. Mr. Stanifer, were you employed by the municipal power system of either Tazewell or New Tazewell separate and apart from employment by the cities?

A. No, sir, I am employed by the cities.

Q. Have you ever been employed by the Powell Valley Electric Co-op?

A. No.

Q. Have you ever been employed by the REA?

A. Electrical——

Q. Rural Electrification Administration?

A. No. I represented the telephone company in regards to an REA proposition, but it was separate and apart from this.

Q. Do you handle new customer orders for the municipal systems, power systems of Tazewell and New Tazewell?

A. No, sir.

Q. Do you handle the payment of obligations of the two systems?

A. Yes. Well, now as an attorney. Under instructions of the mayors of both towns.

[fol. 290] Q. Have they asked you to approve or check on the bills that were presented?

A. Well, all bills presented to the two cities are first cleared through Cottrell and House, engineers, and upon their final approval, then the bills are placed with Douglas Overton, the recorder of the City of Tazewell. Now if the bills were paid, he has the file on that.

Q. Does Powell Valley approve these bills before they are paid?

A. No, there have been none approved by Powell Valley that I know of.

Q. Do you recall a meeting with Mr. Lewis and another representative of Kentucky Utilities prior to this lawsuit?

A. Yes, sir.

Q. Will you state the substance of the discussion at that meeting?

A. Well, we talked about thirty minutes. It's hard to detail that. Of course they informed me that we wanted to talk some off the record on the matter, and we talked.

Q. Was it suggested by the Kentucky Utilities representatives at that meeting that a Court decision would be more—would bring about a more orderly disposition of this matter?

[fol. 291] A. I think so. Now pressing that a little now, that is the first time that I recall Kentucky Utilities has ever come and offered to cooperate with the towns in regard to this matter. Now prior to that there had been letters and telephone conversations with Kentucky Utilities, and we never did get a response until after we had taken—the cities had taken action.

Q. You, I suppose, understood the position of the Kentucky Utilities Company in regard to TVA power in Tazewell and New Tazewell, did you not?

A. Well, I understand that they are interested in Kentucky Utilities and the stockholders, of which I am a member.

Q. Do you recall that Kentucky Utilities asked concerning the means of financing this electric system here at that meeting between you and these representatives?

A. Well now actually I've talked to two or three and I have probably, I know I've talked to Judge Estep about the matter one time, and I assume I talked with them too about the same matter, or there was a conversation with regard to it not any particular discussion about it.

Q. And I believe you refused to divulge the source of the funds to be used to establish this system here.

A. Well now, I don't know exactly how I put it at that time, but at that time I did not feel free that I could divulge [fol. 292] the details because they didn't divulge any details of their actions with regard to the matter.

Q. Their actions were pretty clear, weren't they, what they were going to do?

A. Well, if I understand it, that was prior to this particular suit being filed, and at that time there hadn't been any action taken by them affirmatively.

Q. Wasn't the whole purpose to have a court decision of this question before any action was taken to put in a duplicate system and so forth?

A. I wasn't talking with any attorneys, as far as I know, that represented Kentucky Utilities. I didn't see any necessity of discussing what should be done in legal actions.

Q. Was that the purpose of the meeting, though? Wasn't that discussed?

A. Well, they came to my office. It wasn't an arranged meeting that I know of.

Mr. Rowntree: That's all.

Further Deponent Saith Not.

William R. Stanifer, By: Georgella Mankin.

Sworn to before me this the 19th day of August, 1964.

Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal.)

[fol. 293] Notice of taking depositions and certificate of service (omitted in printing).

[fols. 294-295] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

[Title omitted]

DEPOSITIONS OF:

Mr. C. Wilson House
(August 11, 1964)
Mr. Gabriel O. Wessenauer
(August 12, 1964)

Knoxville, Tennessee
August 11, 12, 1964.

[fol. 296] Exhibits

Number	Description
	(To deposition of Mr. House)
1	Memorandum of Telephone Conversation with Ralph Miner, Oct. 11, 1962
2	Letters: Stanifer to Vogel, 7-19-16; Vogel to Stanifer, 7-26-61; House to Stanifer, 8-7-61; Stanifer to House, 8-10-61; House to Stanifer, 8-11-61
3	Memo, House to Manager's File, 9-1-61
4	Memo with attachments, House to Watson, 6-12-61
5	Letter, Oatts to House, 8-11-61, with attachments
6	Agreements, TV-11505A, TV14190A, and TV-22721A
7	Letters, House to Berry, 3-13-62 and 4-6-62
8	Letter, Berry to House, 4-13-62
9	Memo, House to Manager's Files 4-18-62
10	Memo, House to Button, 10-17-62
11	Memo, House to Button, 10-18-62
12	Letters, House to Miner, 10-31-62; Miner to House, 11-2-62
[fol. 297]	
13	Memo, House to Manager's Files 11-19-62
14	Letter, House to Miner, 11-16-62
15	Memos, Button to Wells, 11-20-62; Hapgood to Button, 11-23-62
16	Memo, House to Manager's Files, 11-28-62
17	Memo, Button to Manager's files, 12-5-62
18	Memo, Van Mol to Wessenauer, 12-10-62
19	Letter, House to Miner, 12-14-62
20	Proposed agreement, Cottrell to DeBusk and Essary, 1-4-63
21	Letter, House to Miner, 5-28-63
22	Memo, House to Button, 6-20-63
23	Memo, House to Button, 8-27-63; letter Miner to House, 8-26-63, letter Hardin to Miner, 8-14-63
24	Letter, House to Miner, 8-30-63
25	Letter, House to Ardery, 9-9-63
26	Letter, House to Miner, 9-23-63; memo House to Button, 9-16-63; letter Miner to House, 9-13-63; letter, Hardin and DeBusk to Miner, 9-11-63
27	Letter, Miner to Hardin and DeBusk, 9-24-63
28	Memo, House to Button, 4-10-64; letter Miner to Clapp, 4-3-64
29	Letter, House to Miner, 5-5-64
30	Letter, Miner to House, 3-18-64
[fol. 298]	
31	Letter, House to Miner, 3-26-64
32	Letter, House to Watson, 4-6-64
33	Letter, House to Miner, 5-28-64; memo House to Button, 5-5-64
	(To deposition of Mr. Wessenauer)
1	Pages 50, 51, and 52 of House Committee hearings, March 10, 1959

[fol. 299] Depositions

These pre-trial depositions of Mr. C. Wilson House and Mr. Gabriel O. Wessenauer, representatives of the Defendant Tennessee Valley Authority, are taken at the request of the Plaintiff, pursuant to notice, copy of which is attached hereto, and by agreement, pursuant to Rule 26, Federal Rules of Civil Procedure, on the 11th and 12th of August, 1964, respectively, before Georgella Mankin, Notary Public at Large, State of Tennessee, in the Legal Department of the Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee.

It is agreed that after the depositions have been transcribed, the names of the witnesses may be signed by the court reporter, the signatures of the witnesses being hereby waived.

The parties did not invoke the rule at this time, and Mr. Asher and Mr. Lewis were present in the deposition room without waiving their rights to testify as witnesses in this cause.

All formalities as to caption, certificate, transmission, etc., are hereby waived.

[fol. 300] C. Wilson House, a representative of the Defendant, Tennessee Valley Authority, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?

Mr. McCarthy: Before you go ahead with that, I don't think it's necessary, but before you go ahead, I think it's understood that all objections are reserved.

Mr. Rowntree: Yes, sir.

Mr. McCarthy: And there's one other matter that I want to bring up. In talking to Mr. House, we found that in our answers to interrogatories we found that we had overlooked one document.

Mr. Rowntree: Yes, sir.

Mr. McCarthy: It's a note that Mr. House made of a telephone conversation with Ralph Miner on October 11, 1962. I thought the most convenient way to get that in the record now would be to submit it as an exhibit to this deposition, if that's agreeable.

Mr. Rowntree: All right, sir.

(The document referred to was marked for identification as Exhibit No. 1, and filed as exhibit to this deposition.)

[fol. 301] By Mr. Rowntree:

Q. What is your name, sir?

A. C. Wilson House.

Q. How old are you, Mr. House?

A. Sixty-one.

Q. Where do you reside?

A. In Knoxville, 1627 Melrose Place.

Q. What is your position with TVA?

A. I'm District Manager of the Eastern District, Division of Power Marketing.

Q. That has to do with the distribution of power?

A. Right, and the administration of power contracts.

Q. What are your—what is the scope of your duties in that position?

A. You mean the function?

Q. Yes.

A. Or the area?

Q. Both.

A. Both?

Q. Yes, sir.

A. Well, the Eastern District extends from South Pittsburg——

Q. Tennessee?

A. Tennessee, southwest; to Bristol, Virginia and Mountain City on the northeast; and goes as far west as Cross- [fol. 302] ville and Jamestown; and then all of the TVA service area east of that general line.

Q. Now what are your duties in that area?

A. The duties in the area primarily in the Division of Power Marketing is to handle the work of the power division in the Eastern District as they pertain to power contracts, application of rates, and administrative matters pertaining to them.

Q. And do you have responsibility with respect to areas to be serviced by the TVA power?

A. Yes, sir.

Q. I noticed in the list of documents relating to the Tazewell and New Tazewell matter that your name showed up more than anybody else's. Can you explain why that is?

A. As being the District Manager, when I'm available, I attend all such meetings.

Q. And did you have the responsibility of attending the meetings relating to Tazewell and New Tazewell?

A. Yes, sir.

Q. Did you attend all of these meetings?

A. As far as I know, I attended every meeting.

Q. Do you know of any other TVA official who did attend all of them?

A. No.

Q. And also, did you have responsibility with reference [fol. 303] to negotiating or arranging matters with Powell Valley Cooperative and with the officials of Tazewell and New Tazewell, with respect to what should be done with respect to Tazewell and New Tazewell?

A. Now would you mind asking that again? I want to get the exact wording of it.

Mr. Rowntree: Read it back.

(The last question was read by the reporter.)

A. I would say in answer to that the determination of the policy, I was not responsible for. In such matters as power contracts and any negotiations, why I get that policy as passed on to me from Chattanooga.

Q. You were responsible for applying that policy?

A. With other ones present. At all of the meetings there was a representative of the Division of Power Marketing present as well as attorney, and as District Manager, I attended all of the meetings, but they were the policymaking and if there was a decision to be made, I looked to them, because that was their responsibility and not mine.

Q. And as far as TVA was concerned, did you arrange to have these people present?

A. Yes, I made, I believe in every case I made the arrangements.

Q. And agreed upon the time and the place?

[fol. 304] A. Right.

Q. And is it not true pretty much that you coordinated the correspondence with respect to this?

A. That is right.

Q. How long have you held that position of District Manager?

A. Since—well, at the early part of 1941 it was then Division Manager, which was the same except they changed it from Division to District.

Q. Mr. House, we have charged a conspiracy in this case, and in order to properly examine that question, we would like to go into some of the background that was perhaps in the minds of the TVA representatives during the period of this case.

Mr. House, you knew, did you not, that Congress struggled about two years over this territorial limitation contained in the 1959 TVA Bond Act?

A. Yes, sir.

Q. You knew that the territorial limitation was an important part of the TVA Bond Act of 1959?

A. Yes, sir.

Q. That there were some strong reasons why Congress put that provision in the Act?

A. Well, I couldn't speak for Congress; I suppose they thought it was a strong reason.

[fol. 305] Q. And you and the other TVA representatives knew, did you not, that after the passage of that Act, there would be pressure from communities and cities on the periphery of the TVA area to get TVA power?

A. I don't know if it would be any more than without it.

Q. In other words, the Act had nothing to do with the desire of the communities for the power?

A. Well, I couldn't answer for the communities.

Q. But past history had taught, had it not, that there was a tendency for communities to desire TVA power?

A. Well, there are many communities that have TVA power, and I'm sure they wouldn't have it if they hadn't wanted it.

Q. Now to refresh your recollection concerning this, I should like to read from the Congressional Record, July 9, 1959, Page 13052.

Mr. McCarthy: May I ask, Mr. Rowntree, is that the permanent record or the daily record?

Mr. Rowntree: This is the daily Congressional Record as bound.

Mr. McCarthy: That's the permanent record then?

Mr. Rowntree: Yes.

Mr. McCarthy: The paging is different in the two of [fol. 306] them.

Mr. Rowntree: This is 13052, and the particular place that this was copied from was the University of Tennessee Library. This is a statement by Mr. Cooper, the Senator from Kentucky, and I believe he was a supporter of the TVA Bond Act.

By Mr. Rowntree:

Q. Is that correct?

A. I do not know, sir.

Q. Quoting:

> "The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility.

"A number of small communities in Kentucky which border Tennessee-Kentucky, some of which are in river valleys whose power is now being sold to TVA may wish to enter into negotiations with TVA to secure power. But the amendment just adopted denies them that right."

And on page 13053 of the Congressional Record, he continues:

"In effect, it—" (Talking about the amendment pertaining to territorial restriction) "—now says to TVA: 'You have very little scope even to make necessary [fol. 307] adjustments around your permieter.'

"And it says to the small communities on the perimeter, 'You can never choose to secure power from TVA, even though your city councils and your people desire it.'"

Does this recall to you that there was considerable discussion at the time of the passage of the Act, that the communities on the perimeter of TVA should be allowed to choose for themselves whether to take TVA power?

A. These records that you have just read, I had not studied those, and at the time did not make a study of the matter.

Q. But Congress went ahead and passed the territorial restriction as contained in this amendment discussed here?

A. I know that the Act was amended, and it had a territorial limitation in it.

Q. Now before the 1959 TVA Bond Act, TVA had made no effort to expand into the perimeter territory occupied by private power companies, had it?

A. To my recollection, we did not try to expand prior to it or after it. Now I took the question as we were the promoters of an expansion, and I'm answering in that way, that to the best of my recollection, we did not try to expand and promote it either prior or after.

Q. Do you recall that the so-called gentlemen's agree- [fol. 308] ment between TVA and its distributors and the private power companies were important considerations in Congress at the time the Act was passed?

A. I did not know that, sir.

Q. Well, to refresh your recollection, refer to the Congressional Record. This is also July 9, 1959, at page 13054, where Mr. Holland, Senator Holland from Florida, brought up the matter of the gentlemen's agreements stating, quote, and he's speaking of the specific agreement between Alabama Power Company and TVA at this time. Quote:

> "It appears on pages 50 and 51 of that record. I ask that that history of the gentlemen's agreement be printed at this point in the record as a part of my remarks.
>
> "There being no objection the excerpt was ordered to be printed in the record as follows:"

This is the excerpt included in the record, quote:

> "Alabama Power Co. entered into an agreement with TVA, dated May 7, 1940, providing for the sale to the TVA of the company's electric properties, franchises, and easements in the eleven counties and portions of two other counties in North Alabama. Out of that contract and the public statements of the parties involved, there grew a definition of the respective [fol. 309] service areas of TVA and Alabama Power Co. in Alabama; and ever since, the boundary line between the two areas has been meticulously observed by all concerned. In a public statement of Director Lilienthal dated March 6, 1938, it was said:
>
> "'A comprehensive'"—and this quotes Mr. Lilienthal. "'A comprehensive plan for a long-term adjustment of relations between the Tennessee Valley Authority and private power companies in the Southeast was proposed today by Director David E. Lilienthal to whom the TVA Board some weeks ago delegated the responsibility of negotiating a basis for settlement.
>
> The proposal now advocated is based on a consideration of total power to be available and upon the express desires of local agencies for purchase of that power, and recognizes the economic importance of avoiding duplication of electric facilities.
>
> The plan which is now suggested will, I believe serve

as an appropriate basis for immediate negotiations, for the following reasons:

"'1. It is comprehensive and provides a long-time basis of adjustment upon which all parties can make their plans for the future.

"'Specifically, if the suggested plan met with the approval of all parties and were put into effect, it [fol. 310] would mean that now and then for the future all the power that the Authority can equitably allocate to Mississippi would be absorbed by the proposed purchase and present commitments; a similar situation would apply in Alabama and Tennessee.'"

The statement continues, and then there follows an excerpt of a statement by Mr. Kefauver from page 4195 of the Congressional Record, Volume 103, Part 11, where Mr. Kefauver says:

"Mr. President, we would not want to have any Senators get a false impression about how the TVA has been operated or about the aims of the TVA. The testimony shows that throughout many years the TVA has operated on a friendly and harmonious basis with private power companies on the perimeter of its area, and there have not been any efforts by the TVA to expand into other territory. The private companies have gotten along all right with TVA."

And Mr. Gore, Senator Gore from Tennessee, follows the printing of this excerpt in the record with this statement, quote:

"Mr. President, as I was saying, I should like to testify that, to the extent of my knowledge, in connection with the working relationships between the TVA and its neighboring utilities, the TVA has complied [fol. 311] fully with the letter and the spirit of the so-called gentlemen's agreement. The working relationships between the private and the public utilities serving the southeast area have been exemplary in many regards for more than a dozen years; and I am glad that the text of the agreement has been placed in the record, so that all may read and may know."

This carried on over into the House at page 14121, Mr. Vincent stated as follows, quote:

> "I will not burden the membership with a recital of the gentlemen's agreement with respect to service areas under which TVA and private utility systems have operated successfully for the last twenty years, but I think that I should remind the membership that such an agreement has existed for this period of time.
>
> "So long as the Congress of the United States had to provide appropriations for any expansion programs, there was, for all practical purposes, no need for a statutory limitation on the expansion of the TVA service area.
>
> "But now that it is proposed by the President, and by a majority of the Congress, that TVA issue revenue bonds for the purpose of building new generating and other facilities, the question of territorial expansion becomes a grave one not only to the privately-owned [fol. 312] utility systems that operate adjacent to TVA, but also to the future of all privately-owned utility systems throughout the nation, as well as of serious concern to the many municipalities, counties, states, and other governing bodies which derive considerable revenue from taxes levied on the private utility systems that operate within their areas.
>
> "While the Tennessee Valley Authority has informed Congress, from time to time, that it has been advised by its legal counsel that it has the legal authority to serve any area within economical transmission distance of its hydroelectric plants, the fact is that it has confined its service area to that encompassed by the gentlemen's agreement earlier referred to, and it is to this area the House bill sought to confine it."

Does that discussion, Mr. House, recall to you the significance in the minds of the members of Congress as to these gentlemen's agreements with respect to territorial area to be supplied by TVA on the one hand and private power on the other?

A. Well, I might say there that I have not been in on conferences with any of the adjoining private power companies on so-called gentlemen's agreement referred to here.

Of course I have had some contacts on operating matters, but as far as negotiations or agreements, I have not been in [fol. 313] on any of the conferences or had any authority or decisions to make in them, and this record I had not studied that particular document.

Q. You were aware that there were such agreements?

A. Yes, I—not particular agreements. Particularly in Alabama; that's another district. I have not read the agreement with the Alabama Power Company.

Q. And you were generally advised that they were not violated, certainly up until the time of the passage of the TVA Bond Act?

A. Well, I had no occasion to ask whether they had been violated or not. There was no occasion where they were discussed to my recollection.

Q. Which would indicate, would it not, that there was no violation?

A. That I can't answer. That I don't know. I can answer your question, I don't know whether there was any discussion such as that or not.

Q. Now, Mr. House, there did come pressure upon TVA to supply power to Tazewell and New Tazewell, is that not true?

A. They—I would like to ask you to define "pressure".

Q. Well, it is the sort of pressure that Congress was talking about in these excerpts I read from, pressure from [fol. 314] individuals in the community, or perhaps city councils.

A. The meetings that I attended, the representatives of the town showed a deep desire to obtain cheaper power for their communities.

Q. Now a meeting was set up between TVA and the representatives of the Chamber of Commerce of Claiborne County in August of 1961. Do you recall that?

A. Yes.

Q. Now I show you copies of documents provided by TVA and ask you if that is the correspondence which established time and place for that meeting?

A. Yes, sir, they are.

Mr. Rowntree: File that as Collective Exhibit Two.

(The documents referred to were marked for identification as Collective Exhibit No. 2 and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Collective Exhibit 2 includes letter, William H. Stanifer to Mr. Vogle dated July 19, 1961; letter of Mr. Vogel to William R. Stanifer dated July 26, 1961; letter of Mr. House—that's you, I guess.

A. Right.

Q. To Mr. William R. Stanifer dated August 7, 1961; letter from Mr. William R. Stanifer to Mr. House dated [fol. 315] August 10, 1961; and letter of Mr. House to Mr. Stanifer dated August the 11th, 1961.

Now what the Chamber of Commerce wanted to do was get together with TVA to see what could be done about the supplying of power to certain communities in Claiborne County, particularly Tazewell and New Tazewell, is that not correct?

A. Yes, sir.

Q. Did you prepare a memorandum for the TVA files with respect to what happened at that meeting?

A. I did.

Q. Will you look at that, Mr. House, and see if that is a copy of that memorandum?

A. Yes, sir. Those notations are file notations; not mine.

Q. That is the handwriting on the edge of the—

A. Yes, that was—

Q. —paper and also there is an interlineation in handwriting on the second page. That's somebody else's notes?

A. Where is that, sir?

Q. Right here (indicating).

A. Oh, yes.

Mr. Rowntree: We file that as Exhibit 3.

(The document referred to was marked for identification as Exhibit No. 3, and filed as exhibit to this deposition.)

[fol. 316] By Mr. Rowntree:

Q. This is a memorandum from Mr. House to Manager's File dated September 1, 1961, subject: Meeting with Representatives of Claiborne County (Tennessee) Chamber of Commerce, and I notice in the first paragraph, if you will take that exhibit, that the Claiborne County Chamber of Commerce was represented by Messrs. William R. Stanifer, Executive Secretary of the Chamber of Commerce; Mr. DeBus—that should be DeBusk—Mayor of New Tazewell; and Mr. Miller and Mr. Coffier, and you state that you are not sure of the names of those individuals. And that TVA was represented by Paul S. Button, Lewis E. Wallace, and C. Wilson House.

Mr. House, Mr. Lewis E. Wallace was a member of the legal division of TVA, he was a lawyer?

A. Yes, sir.

Q. For the TVA?

A. Yes, sir.

Q. And Mr. Paul S. Button was—what was his position?

A. He is Director of Power Marketing.

Q. Now in the first part of that memorandum, Mr. House, you set forth the information given to the TVA representatives by the Chamber of Commerce representatives, and you state that they were most concerned with respect to Tazewell, New Tazewell and Cumberland Gap. Is that your recollection?

[fol. 317] A. Yes, sir.

Q. You also state down at the bottom of that first page that Kentucky Utilities had a county franchise in Claiborne County and served customers in Tazewell and New Tazewell before either was incorporated, and I suppose you have been advised since then that—and you knew at that time that there was a franchise held by Kentucky Utilities in those two municipalities?

A. I did not know at that time, sir.

Q. Well, I mean you knew that it was at least in the form of a franchise from the county held prior to the incorporation of these municipalities?

A. As I recall, they said that they—this is what the representatives told us.

Q. Yes, sir.

A. That they understood that KU had a franchise in Claiborne County, and this was just giving the information that they gave us as to Tazewell and New Tazewell and Cumberland Gap.

Q. So you knew it as of that time for the first time, is it, that you were advised that KU had a franchise in Claiborne County.

Is that the first time you knew it?

A. I believe possibly that it is.

Q. All right, sir. Now with respect to the second page, [fol. 318] you list information given to the Chamber of Commerce representatives by the TVA representatives and the first paragraph states, quote:

> "Due to present territorial limitations in the TVA Act, it is not now believed that TVA power could be furnished to Cumberland Gap. Further study and consideration will be necessary for TVA to decide whether or not Tazewell and New Tazewell could receive TVA power in the absence of amendment to the Act. Results of possible court action on interpretation of territorial limitations in TVA Act might help in making such a decision."

So there was a question in the minds of the TVA representatives, under the TVA 1959 Act, that power could be supplied by TVA to Tazewell and New Tazewell at that time?

A. As I recall, the way this was explained to them and again the decision on this was from—I did not make the decision to pass this information on—but as I recall, it was explained TVA at that time did not feel that they could make a firm commitment.

Q. Why was that?

A. That they wanted to give further study. I can't say why, because it wasn't my decision to make.

Q. Well, was there sufficient discussion at the meeting to indicate that the reason was the territorial restrictions [fol. 319] of the TVA Bond Act?

A. As I recall, there was no lengthy discussion. It was just the statement was made.

Q. Were the specific provisions of the 1959 Act with

respect to territorial limitations discussed at the meeting?

A. As I recall, it was not. The details were not discussed.

Q. Now this second sentence—the third sentence of that paragraph, indicates that a Court decision would be helpful with respect to this question.

Now did the TVA or any other party, prior to this present suit, seek the help of a Court of declaratory judgment with respect to the right of TVA to supply power in Tazewell or New Tazewell?

A. Now ask that question again. I didn't quite get the first part of it.

Mr. Rowntree: Read it.

(The last question was read by the reporter.)

A. Not to my knowledge.

Q. And to your knowledge, no such suit was filed prior to the present case?

A. Right.

Q. Was any effort made to amend the TVA Act so as [fol. 320] to cover TVA's right to supply power to Tazewell and New Tazewell?

A. That I do not know.

Q. No such effort was discussed with you?

A. No, sir.

Q. The second paragraph on that second page of this Exhibit 3 states, quote:

> "If TVA power can legally be furnished Tazewell and New Tazewell, it appears, due to their size, that the only feasible and most economical way would be by the cooperative."

So the TVA representatives advised the people from Claiborne County that it was not feasible for the municipalities to establish a municipal distribution system, is that right?

A. To operate entirely on its own.

Q. Now the third paragraph of that page states, quote:

> "Powell Valley Electric Cooperative has a 5-year territorial agreement with Kentucky Utilities which the cooperative cannot terminate until January 1964 or, possibly, January 1963."

So at that time you knew of this territorial agreement?

A. I did.

[fol. 321] Q. Between the cooperative, Powell Valley Cooperative, and Kentucky Utilities?

A. Yes, sir.

Q. Now, Mr. House, I have handed you a letter from yourself to Mr. F. E. Berry, Manager, Powell Valley Electric Cooperative, dated June 12, 1961, and a five-page document starting with a memorandum from yourself to Mr. James E. Watson, Director, Division of Power Marketing, dated June 12, 1961, to which is attached a letter agreement between Kentucky Utilities Company and Powell Valley Electric Cooperative, January 8, 1958, and an unsigned and uncompleted formal agreement between Powell Valley Electric Cooperative and Kentucky Utilities Company.

And so at the time of this meeting in August of 1961, you were aware of this agreement between Kentucky Utilities and Powell Valley Electric Cooperative?

A. Yes, sir.

Mr. Rowntree: I'll ask you to file that, those papers as Collective Exhibit 4.

(The documents referred to were marked for identification as Collective Exhibit No. 4, and filed as exhibit to this deposition.)

The Witness: May I add something here? You asked Paul Button's title. He is now Director of Power Marketing; in '61, I believe then he was Chief of Power Distribu-[fol. 322] tor Marketing. Mr. Button now is Director. I want to clear that up.

By Mr. Rowntree:

Q. Mr. Button succeeded Mr. Watson?

A. That is right.

Q. As Director?

A. That is right.

Q. Now I'd like to read into the record paragraphs one through four of this letter agreement, January 8, 1958, between Kentucky Utilities and Powell Valley Electric Cooperative:

"1. Neither the Company nor the Cooperative shall serve any customer at any given location, which location is taking service from the other party, or where customer has terminated service at such location from one of the parties and acts to follow that termination by accepting service from the other party.

"2. Any new load shall be served by the one of us whose facilities, taking into consideration territorial boundaries either fixed or following from logical considerations, are closest to such load.

"3. In any instance where there are differences between us as to the application of paragraphs 1 or 2 above, each party will consult with the other in an honest effort to resolve their differences, and in all [fol. 323] such instances the differences of the parties shall be resolved upon an equitable basis.

"4. This agreement shall remain in effect for a period of five years from the date of your acceptance of this letter, and shall continue in effect thereafter from year to year subject to the right of either of us to terminate the agreement at the end of any annual extension, by giving notice to the other not less than ninety days prior to the effective date of termination."

Now in this memorandum, Exhibit 3, the TVA representative pointed out, did they not, that this agreement could not be terminated prior to January, 1964, or possibly January, 1963?

A. We did.

Q. All right, sir. Now were you aware from this Exhibit 4, particularly with respect to the references to this formal agreement, that maps had been worked up with respect to the boundaries between Powell Valley and Kentucky Utilities?

A. Now prior to which agreement?

Q. At the time of this meeting in August of 1961, which is the memorandum, Exhibit 3, at that time were you aware of the existence of these maps that had been worked up as to the boundary between Powell Valley and Kentucky Utilities?

A. I was aware of the proposed agreement to which was [fol. 324] attached a map prepared by KU showing the ter-

ritory they were suggesting. That was the way I understood it when I got the copies of the proposed agreement.

Q. Were you aware that these maps had been worked up by joint representation of Powell Valley and Kentucky Utilities?

A. I did not.

Q. Were you familiar with those maps?

A. I was only familiar when I got the copies of them.

Q. And when did you get those copies? At the time of the letters in Exhibit 4 here?

A. I may have to check that. It was about this time. Just a minute, I think I might check from this if you would like for me to.

Q. All right, sir.

A. I don't believe I have a record of when they were sent, but it was—the best of my recollection, it was near June, in June of 1961.

Q. All right, sir. Now this agreement between—this territorial agreement between Kentucky Utilities and Powell Valley existed at the date of the passage of the Act of Congress for TVA bonds, that's true, isn't it?

A. As I recall, the amendment was passed in 1959, August of '59, and this was prior to that date.

[fol. 325] Q. At any time during the discussions between Powell Valley Cooperative or the towns of Tazewell and New Tazewell and the TVA, were these maps consulted or used in any way to decide where the boundaries should be?

A. To the best of my knowledge, they were never discussed or looked at, because they were attached to a proposed agreement, but as far as I know, the cooperative never did enter into it.

Q. The maps were in existence?

A. Yes, sir.

Q. And were you advised that they had been acted on in questions that would arise from time to time?

A. In what way do you mean "acted upon"?

Q. With respect to customers that might show up with a new house or a new building of some sort and needed service, after the agreement was entered into?

A. Well, the agreement, the maps were not attached to the agreement of '58.

Q. No, I'm not asking that question. I'm asking are you aware that the map was acted upon?

A. I dont—I still don't quite understand what you mean "acted upon."

Q. In the reaching of the solutions to questions that would arise from time to time.

A. That I do not know.

[fol. 326] Q. Now the last paragraph of Exhibit 3, the memorandum with respect to the meeting of August 15, 1961, reads, quote, and this is part of the information given the Claiborne County people by TVA representatives, quote:

> "Not much can be done at this time. In a year or two the situation may become clearer. The towns should be patient but at the same time do anything they think might help their situation. They should refrain from taking any action which would in the future make a changeover to TVA power impossible, such as granting a long-term franchise. TVA is interested and is in sympathy with their desires."

Those were part of the expressions made by the TVA representative at that meeting?

A. They were.

Q. Now at the time of that meeting, Mr. House, you were advised that there was another agreement, territorial agreement or gentlemen's agreement, whatever you want to call it, between Powell Valley Electric Cooperative and Kentucky Utilities, were you not?

A. Which agreement are you referring to, sir?

Q. I'm talking about the agreement of 1952.

A. Yes, sir.

Q. And I show you a memorandum attached to a letter of August 11th, 1961, from Mr. Oatts, Office Manager of [fol. 327] Powell Valley to you and if you will turn to the second page of the memorandum——

A. You mean the memorandum attached?

Q. That's right.

A. Yes.

Q. That states, quote:

"In 1952 when an interchange agreement was reached between the Cooperative, Kentucky Utilities Company, and the Tennessee Valley Authority for joint use facilities at Tazewell, Tennessee, an agreement was reached and is in writing to the effect that neither the Kentucky Utilities Company nor the Powell Valley Electric Cooperative will serve any consumer who is now being served by the other party."

That's the nature of the agreement that you knew of at that time?

A. It is.

Mr. McCarthy: Don't you think that should be filed?

Mr. Rowntree: Yes, we will file it at this time. The agreements themselves—you mean this memorandum?

Mr. McCarthy: This memorandum.

Mr. Rowntree: Well, the details of it goes away back into the past. I hate to encumber the record.

[fol. 328] Mr. McCarthy: Well, I am not sure what purpose you are putting it in for, and if it's going in, I think the whole memorandum ought to go in.

Mr. Rowntree: The question is covered by the question that he knew of this agreement at the time of the meeting.

Mr. McCarthy: This is the agreement that was superceded by the August, 1958, agreement.

Mr. Rowntree: Well, I won't agree to that. We will put the agreements in at this time.

Mr. McCarthy: Well, would you mind putting this entire memorandum in at this time?

Mr. Rowntree: All right, we will go ahead and do that. Put it in as Collective Exhibit 5.

(The documents referred to were marked for identification as Collective Exhibit No. 5, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now, Mr. House, I show you what purports to be contract TV-11505A, Interconnection Agreement Between Tennessee Valley Authority and Kentucky Utilities Company, entered into as of the 22nd day of March, 1951; contract TV-14190A, Agreement between TVA, Powell Valley

Electric Cooperative, and Kentucky Utilities Company, dated October 8, 1952 to which is attached at the end a [fol. 329] letter of Mr. McNiel, Mr. Davis L. McNiel, Manager, Powell Valley Electric Cooperative, to Mr. E. W. Brown, Vice President, Kentucky Utilities Company, dated August 22, 1952; and contract, TV-22721A, Agreement between TVA, Powell Valley Electric Cooperative, Old Dominion Power Company, and Kentucky Utilities Company, and ask you to file those as Collective Exhibit 6, subject to your right to have them checked for accuracy.

A. As to the first exhibit, first contract, that is TVA-11505A, I'm not familiar with this particular contract. I don't know whether it covers any direct connection with any of our distributors or not.

Mr. Rowntree: Will counsel agree that we may file those subject to checking for accuracy?

Mr. McCarthy: No objection.

The Witness: The other two I am familiar with.

Mr. Rowntree: All right, sir.

(The documents referred to were marked for identification as Collective Exhibit No. 6, and filed as Exhibit to this deposition.)

By Mr. Rowntree:

Q. Now the third paragraph of this letter agreement of August 22, 1952——

A. Second agreement?

Q. Yes, reads, quote:

"We understand the third paragraph of your letter——"

[fol. 330] Mr. McCarthy: Pardon me, what are you reading from?

The Witness: This is letter agreement dated August the 22nd.

Mr. Rowntree: At the end of it.

Mr. Pedersen: It's October instead of August, isn't it?

Mr. Rowntree: Well, at the end of it is the letter of that particular agreement.

Mr. Cridlen: Powell Valley Electric Cooperative, August 22, 1952.

Mr. Rowntree: Quote: "We understand the third paragraph of your letter as a statement of policy designed to avoid controversy with respect to the customers in Tennessee served by our respective systems. It appears to us that this meaning might be clarified somewhat by a rearrangement of this sentence and we would like to suggest the following: 'We are agreed that during the term of this agreement neither Powell Valley Electric Cooperative nor the Dixie Power & Light Company will serve any customer who is receiving service from the other party.'"

By Mr. Rowntree:

Q. Do you recall that Dixie Power and Light Company [fol. 331] was a subsidiary of Kentucky Utilities who was merged into Kentucky Utilities after this 1952 date?

A. Yes.

Q. Did you have in your file a copy of the letter of Kentucky Utilities to which the letter of Mr. McNiel of Powell Valley responded?

A. I don't recall having it.

Q. Do you recall that the making of this letter agreement was a condition precedent to the entry of Kentucky Utilities Company into the tri-party agreement of 1952?

A. I was not in on that negotiations at all of the tri-party agreement.

Q. All right, sir. Now, Mr. House, do you recall that another meeting was set up for Cedar Grove in Claiborne County for April 12, 1962?

A. Yes, sir.

Q. With the Claiborne County people?

A. Yes, sir. Claiborne County people and the two towns, Tazewell and New Tazewell.

Q. I show you a letter from you to Mr. F. E. Berry, Manager, Powell Valley Electric Cooperative, March 13, 1962, and a letter from you to Mr. Berry, April 6, 1962, and ask if that is the correspondence under which the meeting was set up?

A. They are.

[fol. 332] Mr. Rowntree: I'll ask you to file that as Collective Exhibit No. 7.

(The documents referred to were marked for identification as Collective Exhibit No. 7, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. I think the individuals present at that meeting are set forth in letter to you from Mr. Berry dated April 13, if you will recall——

Mr. McCarthy: Off the record.

(Discussion off the record.

By Mr. Rowntree:

Q. Do you recall that the individuals set forth on the attached paper starting off with J. M. Campbell were present at that meeting to the best of your recollection?

A. To the best of my recollection. I didn't recall the names, but there were about that number there. I wouldn't question that the list is not correct.

Mr. Rowntree: I would like to file that as Exhibit 8.

(The document referred to was marked for identification as Exhibit No. 8, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now do you recall that you prepared a memorandum [fol. 333] for the Manager's Files with respect to that meeting?

A. I do.

Q. Now, Mr. House, the first paragraph indicates that Mr. Reidinger was present at that meeting. Was he a lawyer from the Legal Department of TVA?

A. He was.

Q. And you were present, were you not?

A. Right.

Q. And Mr. Button?

A. Yes, sir.

Q. And the other people listed in the previous exhibit.

Now the third paragraph, the first sentence of that memorandum, the—let's first file that as Exhibit 9.

(The document referred to was marked for identification as Exhibit No. 8, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. The first sentence of the third paragraph reads, quote:

"The group was advised by TVA representatives that TVA would furnish power to the people in the towns if the towns or Powell Valley Electric Cooperative purchased or constructed a distribution system, provided it was economically feasible."

[fol. 334] Mr. House, do you recall that by that time the TVA had made a decision about supplying TVA power to Tazewell and New Tazewell?

A. Yes.

Q. Was there discussion at the meeting showing how the question that had arisen before was resolved?

A. As I recall, there was no explanation as to how it was resolved.

Q. Was there any discussion at the meeting with respect to the specific terms of the TVA Bond Act of 1959?

A. Not to my recollection.

Q. Did you discuss the resolution of this question with a representative of the Legal Department of TVA?

A. Did I discuss—what was that question?

Q. The resolution of this question.

A. I discussed with Mr. Button and with the Legal—the decision that had been made.

Q. Were you advised as to how the decision was made under the specific terms of the TVA Bond Act of 1959?

A. I don't know exactly what you mean by that question. I was advised that in TVA's opinion that it would not be in violation of the territorial limitation.

Q. Of the 1959 Act?

A. Right.

Q. Did they specify in any manner how they resolved the [fol. 335] question of that?

A. No, I didn't argue it with them, because I agreed with them, in my opinion.

Q. Well, the Legal Department had expressed a question about this at the previous meeting, is that not true?

A. They had expressed that they were not ready to make a definite statement at the previous meeting.

Q. Well, you refer to the language of the first meeting memorandum.

A. That's right.

Q. There was a question about this, wasn't there?

A. That's right.

Q. And you were not advised with respect to how the question was resolved under the language of the Act?

A. No.

Q. That sentence that I quoted says, "purchased or constructed a distribution system".

Now if there was to be a purchase that would mean purchase of the KU—Kentucky Utilities—system in the towns?

A. That's right.

Q. If there was to be construction, that would mean the establishment of a duplicate system along side the Kentucky Utilities system, is that right?

A. That's right.

[fol. 336] Q. And TVA had decided to go along with either course?

A. That's right.

Q. Now that sentence also says that the TVA was willing to—would furnish power if the towns or Powell Valley purchased or constructed a system?

A. That's right.

Q. Now you knew about the agreements between Kentucky Utilities and Powell Valley, these gentlemen's agreements, these territorial agreements?

A. That's right.

Q. And the end of that sentence says that you were willing to do it, "provided it was economically feasible."

A. That's right.

Q. Did you still have in mind the question of the feasibility of municipal systems that you raised at the first meeting?

A. Well, that is one of the provisions for us making the TVA power available to systems, that it will be economically feasible.

Q. And you had questioned the feasibility of a municipal system in New Tazewell?

A. Operating entirely separate, yes.

Q. And this question was still in your mind at this time of this meeting?

[fol. 337] A. It was.

Q. So in your mind, the minds of the TVA representatives, it was feasible only if the cooperative participated in the system?

A. It was only feasible at that time if the cooperative would participate in the operation.

Q. But there was——

A. Not necessarily ownership.

Q. But there was the problem of the gentlemen's agreements affecting territory between Kentucky Utilities and Powell Valley?

A. That's right.

Q. And the second sentence of that third paragraph of Exhibit 9 states, quote:

> "They were advised that due to the relative small number of customers and load, it was probable that the only economical way they could be served with TVA power was by the Cooperative."

So that's a repetition of what you just stated?

A. That's right, yes, sir.

Q. And the third sentence of that paragraph states, quote:

> "They were further advised that due to the territorial agreement between the cooperative and Kentucky Utilities, and the tri-party agreement among the co-
> [fol. 338] operative, Kentucky Utilities, and TVA covering Tazewell Substation there is some doubt that the cooperative could serve them initially."

So there you express your concern about the gentlemen's territorial agreements.

Mr. McCarthy: What do you mean by this "gentlemen's territorial agreements", Mr. Rowntree? You keep labeling these agreements that way. Of course we are gentlemen, but I'm going to instruct the witness not to answer any more questions about gentlemen's territorial agreements.

Now if you want to refer to the documents, that's one thing, but let's not get them labeled.

Mr. Rowntree: Will you repeat the question?

(The last question was read by the reporter.)

By Mr. Rowntree:

Q. Is that the concern that you were expressing?

Mr. McCarthy: I have instructed the witness not to answer that question.

By Mr. Rowntree:

Q. Do you abide by the instruction of counsel?

A. I do.

Q. Now, Mr. House, does this last sentence I quoted express your concern with respect to the territorial agree-
[fol. 339] ments of 1952 and 1958 between Kentucky Utilities and Powell Valley Electric Cooperative?

Mr. McCarthy: Now I'm going to instruct the witness not to answer questions that label those as "territorial agreements" either. Whether they are territorial agreements is a matter of law. If you will refer to the agreements of '52 and the agreements of '58, I'm sure he will be glad to answer any questions that you have about them that he can.

By Mr. Rowntree:

Q. Do you abide by the instruction of counsel?

A. I do.

Q. Do you understand what I mean when I say "territorial agreements of 1952 and 1958"?

A. I'm instructed not to answer when you say "territorial agreements".

Q. Even though you understand what the term means?

A. No answer.

Q. Mr. House, at the time of this meeting, and with particular reference to the sentence I have just quoted from your memorandum, was it the position of the TVA representatives that because of the agreements between Kentucky Utilities Company and Powell Valley Electric Cooperative of 1958 and 1952 that the cooperative could not

initially serve the two municipalities so long as those agree-
[fol. 340] ments were in effect?

A. No, I don't believe that's what we conveyed. We didn't say they could not; we said that there was some doubt.

Q. And what was the doubt?

A. Whether or not they could.

Q. Because of what reason?

A. We didn't explain the reason.

Q. Well, does not this language contained in this sentence explain the reason?

A. I don't quite understand the question, sir.

Q. Does not the language in the sentence, the last sentence of paragraph three of that memorandum, explain why TVA representatives were doubtful that Powell Valley Electric Cooperative could serve power to the two municipalities?

A. It states that there is some doubt, but as to the reason for the doubt, I don't see—can't read that into it.

Q. Well, I'll read it again, quote:

> "They were further advised that due to the territorial agreement between the cooperative and Kentucky Utilities, and the tri-party agreement among the cooperative, Kentucky Utilities, and TVA covering Tazewell Substation there is some doubt that the cooperative could serve them initially."

[fol. 341] Was not the doubt focused around these two agreements?

A. Yes.

Q. All right, sir. Now if the cooperative should serve these municipalities with power, was there not an additional practical problem with the cooperative, expressed by the cooperative that Kentucky Utilities might terminate the tri-party agreement of 1952?

A. How about reading that back?

(The last question was read by the reporter.)

A. I would answer that that the cooperative, not at this meeting, expressed what would happen if Kentucky Utilities cancelled the tri-party agreement.

Q. Now what did this tri-party agreement provide for generally? It was, was it not, to provide for a transmission

line into the Tazewell area from Kentucky Utilities to transmit Kentucky Utilities power into that area to be used by both Kentucky Utilities and by the Powell Valley, the electricity to be charged to the account of TVA. Is that not generally——

A. That's generally right, and the cooperative was to construct a substation from which their customers and KU's customers would be served.

Q. Yes, sir, in that area?

[fol. 342] A. That area.

Q. And if Kentucky Utilities was supplanted in that area and should withdraw from the tri-party agreement of 1952, there would be an absence of power in that area, would there not?

A. If something else wasn't supplied, yes.

Q. All right, sir. Now, was there not an additional problem, so far as the cooperative was concerned, and expressed by the cooperative that the REA, the Rural Electrification Administration, might be opposed to the cooperative taking the customers of Kentucky Utilities?

A. That—Mr. Berry explained that at this meeting, yes, sir, as given in the memorandum.

Q. Now, Mr. House, the fourth paragraph of this memorandum, Exhibit 9, states, quote:

> "Mr. Berry said even if the above agreements should not prevent the cooperative giving service, he doubted seriously if REA would loan them funds or allow them to use their own funds to build a competing system with the probability of litigation from Kentucky Utilities. Mr. Berry said in the event the towns built their own distribution system, he felt sure the cooperative would be willing to enter into a contract to operate and maintain it."

That is the expression made by Mr. Berry at that meet-

[fol. 343] ing, is that right?

A. It is.

Q. So at that time the cooperative, Powell Valley Cooperative, wanted the towns to initially start up this new system, is that correct?

A. At this time, I think Mr. Berry expressed the feeling of the cooperative.

Q. To the effect that we have just quoted here?

A. That's right.

Q. And at that time TVA was saying that it was not feasible for the municipalities to conduct a system?

A. Entirely separate without the assistance of the co-op in operation.

Q. Well now, I'd like to read this last paragraph. Quote:

> "TVA representatives suggested that each of the towns appoint three representatives on a committee to further study the situation and determine what actions should be taken. It was suggested that this committee of six might want to contact Kentucky Utilities to determine if they would be willing to sell the distribution system to the towns or cooperative, and possibly employ an engineering firm to make a study. Any commitments made by the committee would have to have prior approval of the governing boards of the two [fol. 344] towns. The group was advised that both TVA and the cooperative would be glad to confer with the committee at any time."

So is it not true, Mr. House, from this point on that the TVA representatives were in the position of coaching from the sidelines with respect to the—

A. No, I would not say "coach". The representatives expressed an apparently very sincere desire that they wanted cheaper power, and we told them that we would assist them in any way that we could. We advised them that —as brought out here—that we would be glad to confer with the committee at any time, and we did not follow up to see if a committee was appointed, we waited on them to make the next move.

Now I think coaching, using the word "coaching", that we would have been inactive on it. When they asked us, we would meet with them.

Q. It is true, is it not, that you were giving advice and suggestions from time to time?

A. Yes, as they asked for it.

Q. Now Powell Valley Electric Cooperative, in response to interrogatories, listed two letters that are not in the TVA file, according to the answers of TVA. Powell Valley lists letter from Ralph B. Miner, Manager, Powell Valley

Electric Cooperative, to C. Wilson House, District Man-
[fol. 345] ager, TVA, dated August 22, 1962. Do you recall anything about what that letter is about?

A. I couldn't—that date with the number of letters, no, sir.

Q. Let's see, that was some—about four months after that meeting of April 12, 1962.

Then Powell Valley listed letter from C. Wilson House, District Manager, Office of Power, TVA, to Ralph B. Miner, Manager of Powell Valley Electric Cooperative, dated August 29, 1962.

That was number 61 of the Cooperative's listing; the previous letter was number 57.

Do you recall what that letter stated?

A. No, sir.

Q. Now, Mr. House, counsel for TVA introduced at the beginning of this deposition Exhibit 1, being a memorandum with respect to a telephone conversation between you and Mr. Ralph Miner on October the 11th, 1962. Do you recall that there was that phone conversation on that date?

A. I do.

Q. And will you state generally what the conversation was about?

A. Well, as brought out from my notes that I wrote at the time, the telephone conversation with Ralph Miner on October the 11th, 1962:

> [fol. 346] "I advised Ralph Miner that TVA did not feel we should give any recommendation on whether or not the co-op should give notice of cancellation of letter agreement (dated January 8, 1958) with KU. TVA feels this is a matter which the co-op's manager, attorney and Board should decide upon."

Q. Now you relayed that information on to Mr. Button in a memorandum dated October 17, 1962, do you recall that?

A. This memorandum does not refer to my telephone conversation, but it does advise Mr. Button that they had sent a registered letter to Kentucky Utilities giving notice of cancellation.

Mr. Rowntree: We will file that as Exhibit 10.

(The document referred to was marked for identification as Exhibit No. 10, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now this cancellation of that 1958 agreement would take care of one of the problems in the minds of the TVA representatives at these meetings, would it not?

A. It would.

Q. And this territorial agreement of 1958 was designed to take care of disputes between Powell Valley Cooperative and KU as to territory up in that area around Taze- [fol. 347] well?

The Witness: There's that "territorial agreement".

Mr. McCarthy: You may answer the question.

The Witness: Read the question back.

(The last question was read by the reporter.)

The Witness: It was.

By Mr. Rowntree:

Q. And it was one of the agreements in existence at the time of the passage of the 1959 TVA Bond Act?

A. It was.

Q. But you still were concerned about, were you not, the 1952 agreement between Kentucky Utilities and Powell Valley Electric Cooperative?

A. As I recall, we were not concerned, and again this is —it wasn't up to me to make the decision, but we considered that the '58 agreement superceded the '52 agreement.

Q. I'll ask you to look at memorandum here dated October 18, 1962, from you to Mr. Button. Do you recall this memorandum?

A. I do.

Q. I'll ask you to file that as Exhibit 11.

(The document referred to was marked for identification as Exhibit No. 11, and filed as exhibit to this deposition.)

[fol. 348] By Mr. Rowntree:

Q. Now this memorandum was written close to the time of this telephone conversation, was it not?

A. Yes.

Q. And this memorandum relates generally to supply of cooperative power to a housing development there in New Tazewell, does it not?

A. Yes.

Q. Will you read into the record the 5th paragraph of that memorandum?

A. "As you know, the letter agreement dated August 22, 1952, between the cooperative and KU only stipulates that during the term of the tri-party agreement neither the cooperative nor KU will serve any customer who is receiving service from the other party."

Q. And the tri-party agreement was still in effect?

A. The 1958 agreement was in effect, and to bring all of the facts so that Mr. Button and the Legal Department would know the existence of everything, I included that in. I did not say here whether it was in effect or not, because it was not up to me to make such a decision.

Q. Well, Mr. House, you are referring there, are you not, to the 1952 agreement?

A. That's right.

Q. And you were saying there that that was in effect [fol. 349] so long as the tri-party agreement was in effect?

A. No, I'm not saying that it is in effect, because it was not up to me to determine whether it was in effect or not.

Q. Yes. Yes. But anyway it was a problem in your mind?

A. Well, it wasn't particularly a problem in my mind; it was just—I brought out the facts of the—

Q. Yes, sir.

A. Such agreement.

Q. All right, sir. Now would not the existence of that 1952 agreement make TVA representatives disposed to agree that the municipalities should take over this electric service there rather than the cooperative initially?

A. As I recall at this time, we told the cooperative and the towns that they should get together and decide which they thought was the better course to take.

Q. Well, this was a problem that you had with respect

to the cooperative taking over the Kentucky Utilities' customers, a problem related to these territorial agreements, was it not?

A. As I recall, we—after the cancellation of the '58 agreement, that we were not particularly concerned on that problem as such.

Q. Well now, we have just gone through that, Mr. House, [fol. 350] about the 1952 agreement, talking about Exhibit 11 here, the language you quoted from.

A. Right.

Q. So you still had a problem as to this 1952 agreement, is that not true?

A. As I recall, I wasn't particularly—did not think it was a problem at that time.

Q. And yet you raised the question on the face of that last exhibit that you quoted from.

A. Well, as I stated before, it was not my decision to make.

Q. No.

A. So I didn't worry about that particular thing when it wasn't my decision, my responsibility to make the decision.

Q. Well, you worried about it enough, did you not, to point it out to Mr. Button?

A. No, I wouldn't say I worried. I figured that I should point out all of the facts in the matter.

Q. Pertaining to the situation?

A. That is right.

Q. And this was one of the facts?

A. That is right.

Q. Now you recall that another meeting was set up for November the 15, 1962, and I show you letters from you [fol. 351] to Mr. Miner, October 31, 1962, letter of Miner to Mr. House dated November 2, 1962. Do you recall that those letters set up the next meeting?

A. Yes.

Mr. Rowntree: I ask that those two letters be filed as Collective Exhibit 12.

(The documents referred to were marked for identification as Collective Ex. No. 12, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now, Mr. House, the list of documents filed by TVA in response to interrogatories list number 33, notes on meeting held November 6, 1962, between representatives of Rural Electrification Administration and Powell Valley Electric Cooperative.

Do you happen to have a copy of those notes?

A. I do not have a copy here.

Q. Now do you recall preparing a memorandum with respect to what happened at the meeting of November 15, 1962?

A. Yes.

Q. I show you a memorandum dated November 19, 1962, from you to Manager's Files and ask you if that is your memorandum with respect to that meeting of November 15, 1962?

A. It is.

Mr. Rowntree: File that as Exhibit 13.

[fol. 352] (The document referred to was marked for identification as Exhibit No. 13, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now the Cities of Tazewell and New Tazewell, or representatives from those cities, were not present at this meeting, were they?

A. That's correct.

Q. And I observe in the first paragraph that you and Mr. T. Graham Wells, Jr., and Mr. C. A. Reidinger were present. Mr. Reidinger is the lawyer for the Legal Department is he not?

A. That's right.

Q. Who was Mr. Wells?

A. Mr. Wells works for Mr. Button.

Q. And Mr. Cridlin, attorney for Powell Valley Electric Cooperative was also present, is that right?

A. That's right.

Q. And the purpose was to discuss the supplying of power to Tazewell and New Tazewell?

A. Yes.

Q. Is that right?

A. Yes.

Q. The second paragraph states, quote:

> "Mr. Miner said, while in Washington recently, REA [fol. 353] had advised him that REA could not grant a loan to the cooperative to serve the two cities, but the cooperative could use its general fund."

Probably that's covered in the notes of the meeting between REA and PVEC which you don't have there that we talked about a while ago?

A. Yes.

Q. So Mr. Miner did report that at this meeting that REA would not grant a loan with respect to service in the two municipalities, but that the REA would recognize the right of the cooperative to use its general funds, is that right?

A. That's right.

Q. For what purpose?

A. To serve the two cities.

Q. To establish a system?

A. No, as I recall, he just made the statement there that says it would not grant a loan to the cooperative to serve the two cities, but the cooperative could use its general fund to serve the two cities.

Q. Now a loan, I suppose, would contemplate something more than just the setting up of some service lines?

A. Well, on the loan, I'm not familiar and have never been in on negotiations between the cooperative and REA, so I believe you'll have to get that answer from somebody more familiar.

[fol. 354] Q. Well, I'm asking you as to what kind of problem was confronted here and the necessity of talking about a loan to the cooperative. Was it suggested in the meeting that the cooperative go ahead and establish this system, getting a loan from REA? Was that what was being considered?

A. I presume that was the reason that Mr. Miner checked with REA to see if it would be possible to get a loan to serve the two cities.

Q. And the REA turned that down but said that the co-

operative could use its general fund for that purpose, is that right?

A. That's what I understood Mr. Miner to say at the meeting.

Q. In the third paragraph, you will observe, Mr. House, the first sentence states, quote:

> "TVA representatives advised the cooperative that a decision should be made as to whether the cooperative or the two cities will undertake to purchase Kentucky Utilities' facilities and, if that fails, to build a competing system."

So you wanted a decision, did you not, as to which one was going to go ahead with this thing?

A. We figured the decision should be made.

Q. All right, sir. And you were still worried about the letter agreement of 1952 attached to the tri-party agree-
[fol. 355] ment at this time too, weren't you?

A. We recognized it might cause some difficulty.

Q. All right, sir. And the second sentence of that third paragraph reads, quote:

> "The letter agreement between the cooperative and Kentucky Utilities, which is still in effect and is a part of tri-party agreement, might cause some difficulty if cooperative should start a competing system."

That was your concern, right?

A. Yes, sir.

Q. Then under these circumstances, the TVA made some detailed suggestions as to what steps should be taken, did they not?

A. That's right.

Q. If you will read the fourth paragraph and on over to the next page, it states, quote:

> "Regardless of who plans to initially serve the area, it was recommended that an engineering firm be employed to make an evaluation of the KU properties. It was agreed that probably the area to be considered would be that area now served by KU out of the Tazewell Substation, which includes Tazewell, New Taze-

well, and some rural customers in the vicinity and on Highway 25E as far northwest as the Powell River. [fol. 356] It was suggested by TVA representatives that, first, an offer should be made to KU for the purchase of facilities and customers, and if KU refuses to sell, then start building a duplicate system at once.

"It was pointed out that if the cities plan to serve the area initially, they would need to have their financing arrangement made, and an agreement with the cooperative providing for the operation of the system.

"We suggested that the cooperative's attorney become familiar with cooperative laws in Tennessee and also determine the best method for the cooperative to purchase the system from the cities if it is initially acquired or constructed by the cities. He should also determine if it would be possible and feasible for the cooperative to purchase cities' revenue bonds.

"In connection with Hammond Fowler's letter dated October 5, 1962, to Mr. Kivell, an attorney in Tazewell, Mr. Reidinger recommended that the cooperative and the two cities should request a hearing before the Tennessee Public Service Commission on any territory boundary which might be applied for by KU. He further suggested that the two cities pass resolutions that it is to the public interest for the cities to either purchase KU facilities or build a competing system; the Public Service Commission should be requested to [fol. 357] deny KU a certificate of convenience and necessity, and should order KU to either reduce its rates to the level of the cooperative rates or sell its facilities to the cooperative in the public interest.

"TVA representatives told Mr. Miner that a meeting with two or three representatives from each of the two city councils (Tazewell and New Tazewell) would be preferred to a meeting with the Claiborne County Chamber of Commerce as requested. He will make arrangements for this meeting to be held in writer's office on Tuesday, November 27, at 1:30 p.m."

Those are the suggestions made by the TVA representatives at the meeting?

A. That's right.

Q. Now the last paragraph states, quote:

> "The cooperative representatives requested that TVA advise them if TVA will provide a delivery point to the cooperative (and also to the cities if necessary) in the vicinity of Tazewell in the event KU is not willing to continue to deliver power to Tazewell on an interchange basis."

Mr. House, that concerns the—that pertains to the concern of the cooperative that we previously discussed, the practical problem, if KU pulled out of the tri-party agreement, is that not right?

[fol. 358] A. That's right.

Q. Now we read there that another meeting was to take place on November 27th at the suggestion of the TVA representatives, is that not right?

A. Yes, sir. I might add there that the suggestion for the meeting wasn't necessarily from TVA. The towns and the cooperative told us that they were very anxious to hold a meeting and we suggested representatives from the towns, at least two, instead of the Chamber of Commerce.

Q. All right, sir. I show you a letter from you to Mr. Miner dated November 16, 1962, and the fourth paragraph of that letter states, quote:

"You will also——"

This is a letter from you to Mr. Miner.

> "You will also make arrangements with two or three representatives from the city council of both Tazewell and New Tazewell to meet with us on the same day at 1:30 p.m."

Will you file that as Exhibit 14.

(The document referred to was marked for identification as Exhibit No. 14, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now, Mr. House, this question raised in the last paragraph of Exhibit 13 by the cooperative required some [fol. 359] study, did it not?

A. Yes.

Q. That is as to the feasibility and cost of running TVA power into the vicinity in the event that Kentucky Utilities pulled out of the tri-party agreement of 1952?

A. Yes, it took some study on what the effects would be.

Q. And I show you a memorandum from Mr. Button to Mr. T. Graham Wells dated November 20, 1962, and a memorandum from Mr. Hapgood, K. E. Hapgood, Director of Power Planning and Engineering, to Mr. Button dated November 23, 1962.

A. I did not get copies of these at the time they were made.

Q. Now these copies were made from the papers furnished by TVA in response to our request. Would you agree that these are the results of the study needed by the question raised by the cooperative in this regard?

A. Well, I'll have to glance over them; I haven't read these previously.

Would you read that question?

(The last question was read by the reporter.)

The Witness: Yes.

Mr. Rowntree: I want to file those as Exhibit 15, please.

[fol. 360] (The documents referred to were marked for identification as Collective Ex. No. 15, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Mr. House, this first memorandum from Mr. Button to Mr. Wells indicates that a TVA Board meeting was coming up to consider this question, does it not?

A. It does.

Q. And it asks for the preparation of material for presentation of the matter to the Board. That's generally the purpose of the memorandum, is that not true?

A. Yes, sir.

Q. And then the second memorandum from Mr. Hapgood to Mr. Button—I suppose I'll have to read it into the record, quote:

"Service to Tazewell could be provided by the construction of a 69 kv transmission line from the pro-

posed Speedwell, Tennessee, Substation to Tazewell at a cost of the order of $500,000. For service to only the Tazewell load a 5000 kva, 69-13 kv substation could be installed at a cost of some $175,000.

"If service were to also be provided to Powell Valley EC at Tazewell, we would probably construct a 20mva, 69-26 kv substation to supply the Powell Valley EC's loads because they have plans to convert their system [fol. 361] in this area to 25 kv. The cost of this substation with one 26 kv ocb would probably be some $275,000. Assuming that service to Tazewell would be provided at 13 kv it would be necessary to install a 5000 kva, 26/13 kv transformer bank with a 26 kv breaker at a cost of some $75,000. For TVA's purposes no breaker would be required on the 13 kv side. However, if Tazewell were to request breakers for the termination of more than one 12.5 kv circuit then TVA may consider installing one of these breakers at its expense. 13 kv breakers could cost $18,000 to $20,000 each.

"These estimates are not based on any detailed studies and are subject to refinements but they may be adequate for your purposes and are certainly the best we can do on a day's notice. It is believed that detailed studies may indicate the most economical plan to supply Tazewell and Powell Valley would be for TVA to construct a 15 mva, 69-26 kv substation as an expansion of the present substation, if property is available to do this, to supply Powell Valley at 26 kv and TVA purchase the present Powell Valley 33/66-13 kv, 5000 kva substation from Powell Valley and use it to supply Tazewell."

Mr. House, are you advised as to whether the TVA Board took action upon this matter?

[fol. 362] A. I was not present at the Board meeting. They——

Q. Did the Board approve the installation of the necessary facilities, if Kentucky Utilities pulled out of the tri-party agreement?

A. The Board advised—I was advised that I could in turn advise the co-op that TVA would continue to serve power to the cooperative to serve the Tazewell area.

Q. Through its own facilities?

A. We did not state how it would be served, as I recall.

Q. Was it contemplated that these TVA facilities would be established?

A. If——

Q. If KU pulled out?

A. If KU pulled out and we could not enter into an agreement with them in order for the Tazewell area to be served, someone would have to build a transmission line into the area.

Q. And you were authorized to commit the TVA to furnish such power?

A. We were authorized to advise the co-op that we would continue to furnish power. Now that is not evading your question, because some of our distributors build their own 69 kv lines.

Q. Now, Mr. House, TVA lists number 39, letter from [fol. 363] Clyde Y. Cridlin, attorney, Powell Valley Electric Cooperative, to Hammond Fowler, Commissioner, Tennessee Public Service Commission, dated November 26, 1962. Apparently Powell Valley does not have that letter, because they have not listed it. I wonder if you would——

A. I do not have it in my file, because I wasn't involved on that.

Mr. Rowntree: Will counsel furnish a copy of that letter in face of the fact that apparently Powell Valley did not have it?

Off the record.

(Discussion off the record.)

By Mr. Rowntree:

Q. We come now, Mr. House, to this meeting of November 27, 1962, and you did provide a memorandum with respect to that meeting. I show you memorandum dated November 28, 1962, from you to Manager's Files and ask you if that is memorandum of that meeting?

A. Yes, it is.

Mr. Rowntree: I ask that that be filed as Exhibit 16.

(The document referred to was marked for identification as Exhibit No. 16, and filed as exhibit to this deposition.)

[fol. 364] By Mr. Rowntree:

Q. The first sentence of that letter reads, quote:

> A meeting was held in the writer's office on November 27, 1962, at the request of the cities of Tazewell and New Tazewell to discuss what action the cities should take in their endeavor to obtain low cost electric power."

Really this is a meeting set up in the previous memorandum and letter that has already been filed, is it not?

A. That's right.

Q. And present at those meetings were the mayors of the two municipalities of Tazewell and New Tazewell, Mr. Stanifer, attorney for Tazewell and New Tazewell, also representatives of the Chamber of Commerce, and Mr. Miner and Mr. Cridlin, and representing the TVA yourself and Mr. Button and Mr. Edgar H. Drum.

Who is Mr. Drum?

A. He is a TVA attorney.

Q. Now at that meeting, was it not put up to the cities that the cities and not Powell Valley would initially take over the distribution of power and municipalities?

A. That's right.

Q. Quoting the second paragraph, quote:

> "Mr. Miner said he had discussed this matter with his board and they believe the two cities, instead of [fol. 365] the cooperative, should take the necessary steps to purchase KU properties or build a competing system in Tazewell and New Tazewell. This decision was based on REA's and the cooperative's thought that it might be detrimental to the REA program to build a duplicate system. (Another reason, which was not mentioned to the cities' representatives, is territorial letter agreement dated August 22, 1952.)

Now why would this operation of the—or the setting up of the distribution system in the municipalities by the cooperative be detrimental to the REA program?

A. Well, that was based on REA's and the cooperative's thought. We didn't——

Q. Was the reason expressed?

A. As I recall, the reasons were not expressed. I don't recall them being expressed.

Q. Well do you know what the reason was?

A. No, I don't know definitely what the reason was, no, sir.

Q. Was it not public reaction to the taking of customers of private utilities by the cooperative?

A. It could be.

Q. By TVA power. It could be?

A. It could be, yes.

Q. Would not the setting up of a duplicate system be [fol. 366] wasteful and rather extravagant?

A. Certainly two systems cost more than one.

Q. And the public reaction to this action by the cooperative would be detrimental to the REA program, is that not true?

A. I think that would have to be answered by REA. And I think another thing, you'd have to define among which people.

Q. Now you state in here that you did not mention this 1952 agreement between Kentucky Utilities and Powell Valley to the representatives of the cities at that meeting, but it was a matter of concern in your mind?

A. Frankly, I don't know why I put that in here.

Q. Well, was it not because it was important in the minds of the TVA representatives?

A. I don't know that it was. I'm truthful when I say I don't know why I put it in at this time.

Q. You were making a memorandum of what took place at the meeting, were you not?

A. I was—did, yes.

Q. And were you also setting forth considerations which were important with regard to what took place at the meeting, is that not right?

A. I don't know why I put it, sir.

Q. Then the second and third pages, do they not relate [fol. 367] a number of steps to be taken by the cities and the cooperative?

A. That's right.

Q. In accomplishing the purposes?

A. That's right.

Q. The first paragraph on page two of Exhibit 16, qoute:

"After considerable discussion of the problems involved and possible actions which could be taken, it was decided by the cities and cooperative that the following should be the initial steps:

"1. The two cities will pass a joint resolution to the effect that they are going to endeavor to obtain low cost power for their citizens. The resolution to be specific on their intent but not too specific on how it will be accomplished. Mr. Stanifer, Attorney for the two cities, is to prepare a suggested resolution and send it to Mr. Cridlin for his comments. Mr. Cridlin will send it to TVA for comments. After all comments are received, the two cities will pass the resolution.

"2. Each of the two cities will appoint a committee of two councilmen and the mayor. The Claiborne County Chamber of Commerce will probably have two representatives on this committee.

[fol. 368] "3. Mr. Stanifer and Mr. Essary, Mayor of Tazewell, plan to be in Nashville on November 30, and will endeavor to talk to representatives of the Tennessee Public Service Commission and get suggestions from them.

"4. The cities will employ a consulting engineer to make an appraisal of KU facilities and customers served from the Tazewell Substation and also an estimate of cost to construct a duplicating system. Mr. Miner is to make arrangements for a meeting between R. H. Cottrell and the cities' committee to discuss the proposed study.

"5. Mr. Miner will make an estimate of cost for the cooperative to operate and maintain the electric system in the event it is acquired or constructed by the cities. (I understand this cost will be based on an increment basis.)"

What does that mean, increment basis?

A. How much additional it will cost them to do this.

Q. Can you explain that further?

A. Well, I think it's sort of hard to explain, but they would base what their operating costs were without operating and maintaining the city system, and then figure what

would be their total cost by doing their own work, and that [fol. 369] for the city, and the difference between that would be your increment basis.

Q. Would this be an additional cost if they did operate and maintain the system of the cities?

A. That's right. How much more would it cost them if they took over the operation, that's what "on an increment basis" meant.

Q. Why would there be additional costs?

A. Well, for the cooperative to operate and maintain the city system, why it's bound to be a cost. You have to read the meters; if a transformer fuse blows, you have to replace it; if lightning knocks an insulator out, it has to be replaced. That's the operation maintenance of a system.

Q. How would this be different from any other cooperative system in any other area?

A. I don't quite understand the question.

Q. When the cooperative goes into any area, there is a cost in going in there, but is there any difference between going into Tazewell and New Tazewell, and——

A. No, this was to make an estimate of what that cost would be.

Q. So the cooperative did not have the facilities there to really establish a municipal—a system of distribution of power in those cities?

A. I couldn't answer that, but I understand that they [fol. 370] have an operating crew there, and the operating crew could, I presume, handle the distribution system in the city. It might take more men or it might be some of the outlying area that the present—assuming they have a crew there—some of the outlying area that that crew handles now could be handled by another crew. I don't know the details of the co-op's operation in Tazewell.

Q. But the facilities that Powell Valley had there in the area were such that this would be a major cost step?

A. I think you would have to get that answer from the co-op, but I don't think it woud be a major step.

Q. Well, we are talking here about costs and apparently this is what this paragraph related to, some major cost item here.

A. I don't—I didn't then and now think—well, what is a major cost? In the cost of the co-op, in the total cost of

the co-op, it would not be a major cost, so it all depends on what you are comparing the cost of this to.

Q. The paragraph——

A. I'm not trying to get you confused on it.

Q. Well, I was just trying to understand your language on it, but apparently there was a cost item involved if the cooperative took over the distribution of power in the cities of Tazewell and New Tazewell.

A. Yes, there would be cost. You can't operate and main- [fol. 371] tain a distribution system—I know that KU has operation and maintenance of their distribution system in Tazewell.

Q. In other words, it would not be like Powell Valley expanding throughout an area that it already occupied?

A. It would to an extent, yes.

Q. Well, Powell Valley does not have the problem of considering costs every time it drops a line to a house on the fringe of its area.

A. It doesn't have to calculate it, but each customer they add adds something to their cost, and the whole thing is the magnitude of it.

Q. And the magnitude of taking over Tazewell and New Tazewell——

A. And if you take over—if you compare the cost for the Powell Valley Electric Cooperative as it is now and add Tazewell and New Tazewell, the percentage of cost would not be great, the increase of percentage.

Q. Paragraph 6, quote:

> "6. After items 4 and 5 above are completed and reviewed, representatives of the cities, cooperative, and TVA will have another meeting to discuss the matter further and decide upon the next step or steps to be taken.
>
> "TVA representatives advised the group that TVA [fol. 372] is not promoting this project; however if the cities and cooperative think it is to their interest to obtain TVA power for Tazewell and New Tazewell and plan to take such action as is necessary to accomplish this, TVA will cooperate with them. They were further advised that in matters of this kind there is always the probability of injunctions and court actions

to delay their plans. Mr. Button urged the cities and cooperative to make their plans flexible enough so that either the cities or cooperative could serve the cities initially."

Then, Mr. House, this last paragraph, where it shows a concern on the part of the cooperative still as to whether TVA would commit itself on the power supply, quoting:

"Mr. Button assured the cooperative representatives that TVA will continue to furnish the power supply requirements of the cooperative in the Tazewell area."

Was that in response to a continuing concern by the cooperative that TVA would commit itself for the power?

A. I don't know as I would say a continuing concern, but at these meetings, the representatives of Tazewell and New Tazewell are not the same at all the meetings, and as I recall, this was brought out just to assure them that TVA would continue to furnish their power requirements.

[fol. 373] Q. Now was this because of the Board action earlier in the day?

A. I wasn't at the Board meeting, but I presume that he could give more assurance than he did before.

Q. So the Board——

A. I don't know—as I say, I didn't attend the Board meeting.

Q. All right, sir. Let's go to——

Mr. McCarthy: Excuse me, Mr. Rowntree, shouldn't you put in those memoranda dealing with the Board action so we will have the story complete?

Mr. Rowntree: All right, sir. Here's a memorandum dated December 5, 1962, from Mr. Button to Manager's Files. We will file this December 5, 1962, agreement as Exhibit 17.

(The document referred to was marked for identification as Exhibit No. 17, and filed as exhibit to this deposition.)

Mr. Rowntree: And then we have memorandum dated December 10, 1962, from Mr. Van Mol, General Manager of TVA, to Mr. G. O. Wessenauer, Manager of Power of TVA, and which we file as Exhibit 18.

(The document referred to was marked for identification as Exhibit 18, and filed as exhibit to this deposition.)

[fol. 374] By Mr. Rowntree:

Q. This Exhibit 17, the December 5, 1962, memo, first paragraph, quote:

> "On November 27, 1962, there was a discussion with the TVA Board on recent developments relating to the efforts of the people of Tazewell and New Tazewell, Tennessee, to obtain TVA power."

Then the next two paragraphs sort of summarize what had happened thus far. I suppose that's a fair statement of those second two paragraphs, is that not right, Mr. House?

A. Yes, sir.

Q. Then the fourth paragraph on over, quote:

> "The cities have not renewed the company's franchises and are planning to appeal to the Tennessee Public Service Commission for rate relief or offer to buy the company's facilities serving them. They contemplate ultimate service through the cooperative. Initially, it may develop that distribution-system financing may take the form of a lease-purchase-operation arrangement with the cooperative.
>
> "The power for this area now comes from the Kentucky Utilities system. Under a tri-party agreement, TVA delivers power to the company at our major interchange points in return for delivery by the company to the cooperative for our account at cooperative's substation in Tazewell. Part of the capacity of this substation is reserved for the company to serve about 4900 kw from this substation. Most of this load is in the area surrounding the towns.
>
> "It is apparent that if the cities are successful in their efforts to transfer their source of power to the cooperative, the company will have little interest in either continuing or expanding the transmission facilities serving this area. In view of this fact, the cooperative has asked if TVA would give them assurance of

[fol. 375]

a supply of power at this location even if the present interchange arrangements are discontinued.

"During the discussion, we pointed out that under the tri-party arrangement TVA established a delivery point for the cooperative at this location, but the cooperative provided the transformation facilities during the development of new loads in this area and TVA was able to delay investment normally related to this service. Even if the cities' loads were not added to the cooperative's system, other growth would soon require increased substation capacity and system strengthening. In either event, we would seek to take care of the growth as economically as possible, but if interchange was no longer available the development of our system in this area would entail extending a presently ap- [fol. 376] proved 69-kv line from LaFollette to Speedwell on up to Tazewell. This line and the terminal facilities might require additional investment of as much as $500,000 or even $750,000. These amounts, however, would provide strengthening in an area where there is need for economic growth and the facilities would provide for a number of years in the future.

"In view of the above, we recommended that TVA should assure the Powell Valley Electric Cooperative TVA would continue to supply their power requirements in the vicinity of Tazewell, Tennessee."

And then the memorandum of December 10, 1962, by the general manager, quote:

"On November 27, 1962, following the discussion of the above subject, including the status of efforts by Tazewell and New Tazewell to obtain more economical power, the TVA Board approved the recommendation of the Office of Power that the Powell Valley Electric Cooperative be advised that TVA will continue to provide their future power requirements in the vicinity of Tazewell, Tennessee. The Board considered TVA's responsibility to continue serving the power requirements of the cooperative at this location as well as the need and urgency to encourage economic growth in this part of the region."

[fol. 377] Well now, that first memorandum indicates that TVA had delayed its investments normally related to this service during the development of new loads there in the Tazewell area. In other words, is it not true, Mr. House, that the demand from customers and the development of customers went on after Kentucky Utilities made the investment of a transmission line into the area to develop the field and Powell Valley established a substation without TVA having to make any major investment?

A. Now what?

Mr. Rowntree: Read the question.

(The last question was read by the reporter.)

The Witness: Yes, the co-op developed load in the area.

By Mr. Rowntree:

Q. Well, I'm talking about the transmission lines supplying power by Kentucky Utilities.

A. Yes.

Q. Into a substation of the cooperative's.

A. Cooperative's, that's right, and by doing such a thing, the Kentucky Utilities did not have to install a substation and TVA did not have to install a transmission line.

Q. And TVA did not have to make any major investment?

[fol. 378] A. That's right.

Q. So the——

A. And in the area served by the co-op from the Tazewell substation.

Q. And now the demand had developed and the load built up to an economical level, TVA was willing to put a transmission line into the area, is that the situation?

A. TVA was willing to put a transmission line into the area if they could not work out an interchange agreement with KU that would be more economical and feasible.

Q. Well, in the light of the development of the demand during the time that the Kentucky Utilities was supplying the electricity?

A. Well, I don't quite—I don't quite get the connection of that question, because we had not refused to build a transmission line into the Tazewell area. When the load

there that could not be served out of their present delivery point——

Q. I didn't ask you——

A. It was TVA's responsibility to get the power in, and by working with the tri-party agreement, with Powell Valley and KU, it was more economical for the three to do it that way.

Q. Yes. Well, I didn't ask you whether TVA had refused to supply the power in the old days, but here was a juicy [fol. 379] plum of a market, of electric customers developed by Kentucky Utilities power, is that not true?

A. If—I would want to qualify Kentucky Utility power. It was TVA power that Kentucky Utility supplies to our account.

Q. Yes, sir.

A. But I don't—I can't see where it was a plum particularly. Sure it saved TVA money, but it saved everyone money on the way the arrangements were made.

Q. But it would serve Kentucky Utilities a severe loss if Tennessee Valley Authority took over the transmission service at that point.

A. Read that question back, I didn't catch it.

(The last question was ready by the reporter.)

A. Taking over the transmission thing, that doesn't bring revenue. I can't quite see the connection of that question. If TVA would build a transmission line to replace KU's line, and that's all it did, there would be no loss to KU until they had to put in their own substation.

I'm not trying to mix us up, but I can't quite get the connection of where the——

Q. The KU line was in there, and TVA was contemplating the substitution of that line with a TVA line into this developed area.

[fol. 380] Mr. McCarthy: If KU cancelled the contract.

The Witness: If KU cancelled the contract and we could no longer get an interchange agreement with KU.

By Mr. Rowntree:

Q. And the fear was that KU would not be inclined to go along with the tri-party agreement, because it was being pushed out of the area, is that not right? That was the concern?

A. I think that's a fair assumption, yes.

Q. I show you a letter from you to Mr. Miner dated December 14, 1962. Down at the bottom of the second paragraph, quote:

> "We would appreciate being kept currently advised of any developments.
>
> "We assure you that TVA will continue to provide your cooperative's future power requirements in the vicinity of Tazewell."

There again you reassure——

A. Here we are putting into writing what we told them verbally at the meeting.

Q. I see. All right.

A. Which I think they wanted for their file.

Mr. Rowntree: We will file this letter as Exhibit 19.

[fol. 381] (The document referred to was marked for identification as Exhibit No. 19, and filed as exhibit to this deposition.)

Mr. Rowntree: We might note for the record that Powell Valley has furnished counsel for Kentucky Utilities a copy of previously referred to letter of November 26, from Mr. Clyde Y. Cridlin to Hammond Fowler, Commissioner, Tennessee Public Service Commission.

By Mr. Rowntree:

Q. Mr. House, do you recall being advised that Mr. Cottrell, an engineer in Nashville, had been requested for—requested to provide a cost of appraisal of the KU system in Tazewell and New Tazewell?

A. Yes.

Q. And this paper I have handed you is a very dim copy provided by TVA of the proposal of Mr. Cottrell as to

the cost of developing this appraisal. Will you file that as Exhibit 20?

(The document referred to was marked for identification as Exhibit No. 20, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Now, Mr. House, were you advised as to whatever happened to this appraisal proposition? Was there an appraisal made?

[fol. 382] A. I don't recall that I was advised.

Q. You don't know?

A. No, I don't.

Q. Can you decipher, or do you know, what the cost of this appraisal would amount to as set forth there on page 2, the second letter? I can't read it.

A. I can't either.

Q. It looks pretty expensive though, doesn't it?

A. I don't know, compared to what?

Q. Well, I notice, Mr. House, I can decipher that Mr. Cottrell was proposing to appraise the property of Kentucky Utilities on two different bases. Under part one, the suggestion that they appraise the system of Kentucky Utilities within approximately one-fourth of a mile—or three-fourths of a mile of the limits of the cities, is that——

A. I can't——

Q. Do you know anything about this thing?

A. No. Mr. Miner sent me the copy, and I sent a copy on to Chattanooga and put it in the file, and I didn't study over it. As I recall, I didn't comment to anybody on the details of it.

Q. Under Part 2, the appraisal would cover a broader territory, is that not right?

A. I can't read this.

Q. And include the area——

[fol. 383] A. I don't know what it does.

Q. Include the area up to the Powell River. Is that not in accordance with——

A. You've got it on me. I can't—maybe yours is better than mine. I can't read this one.

Q. Part 2, let's see if we can't read it:

"Consists of an appraisal of the electric distribution system operated by Kentucky Utilities Company in Tennessee south of the Powell River."

Is that not right?

A. I couldn't tell you, not from this.

Q. Well, it's true, is it not, that TVA representatives had suggested in a previous meeting that the offer of purchase be made of all facilities south of the Powell River?

A. Yes, served out of the Tazewell substation.

Q. Now I show you a letter dated May 28, 1963, from you to Mr. Miner. What is the purpose of that letter?

A. The purpose of this letter is arranging a meeting to meet Mr. Miner and his attorney in my office on June the 14th, 1963.

Q. All right, sir. File that as Exhibit 21.

(The document referred to was marked for identification as Exhibit No. 21, and filed as exhibit to this deposition.)

[fol. 384] By Mr. Rowntree:

Q. Now I notice we have no memos in the file with respect to this meeting. Do you recall, Mr. House, was it not agreed at this meeting in which the cities did not participate, but which was between TVA representatives and Powell Valley representatives, that Mr. Ardery would be employed as attorney for Tazewell and New Tazewell?

A. I didn't have a memorandum in the file, and my notes were practically no notes on it at all. I don't recall whether it was at that meeting or on the telephone later that the towns were going to hire Mr. Ardery.

Q. Do your notes specify sufficiently the nature of the meeting or the purpose of the meeting to generally relate what happened?

A. No, it doesn't. I had noted those who were present, Mr. Miner and Mr. Cridlin of Powell Valley Electric Co-op, Mr. Button, Mr. Reidinger and me representing TVA, and my notes don't have anything specific enough to know except it was on discussing the possible service in Tazewell and New Tazewell.

Q. Well, do you not recall that Mr. Miner agreed in this

meeting that he would approach the mayors about employing Mr. Ardery?

A. I don't recall it was at this meeting, but I recall him discussing it. It could have been at this meeting.

[fol. 385] Q. Do you recall whether at this meeting the mechanics of making the actual formal commitments for the supplying of power to the municipalities was established, was arranged and agreed upon at this meeting?

A. How about reading that back?

(The last question was read by the reporter.)

A. I don't recall that it was. It could have been, but I don't recall. None of the details of that was discussed. It could have been discussed in a general way.

Q. Now I show you a memo from you to Mr. Button dated June 20, 1963, and do you recall this memorandum?

A. Yes.

Q. I'll ask you to file that as Exhibit 22.

(The document referred to was marked for identification as Exhibit No. 22, and filed as Exhibit to this deposition.)

By Mr. Rowntree:

Q. Quoting that memorandum:

"Ralph Miner called me today and advised me the following:

"Phil Ardery has returned from Europe and called Miner yesterday. Miner met with the mayors of the two towns yesterday. A meeting of the mayors and Ardery has been set for July 12. Miner believes they [fol. 386] will employ him. Miner discussed with the mayors the items which will be included in letter regarding agreement, which seemed to please them. They decided it best that no letters be written (including TVA's letter to cooperative, advising town can be served with TVA power) until after they talk (and employ, we hope) with Ardery."

Mr. House, is it not true that TVA and Powell Valley Cooperative were anxious for the municipalities to employ Mr. Ardery?

A. I would say that TVA was anxious that the towns that they were going to enter into this venture have good legal advice, and that's not saying that is any reflection on anyone. We certainly did not bring up the name of Mr. Ardery.

Q. Who did?

A. Well, I would—I don't know who was the initial one that brought the name up, but we were—we knew that they were considering him, and we——

Q. Well, you hoped that they would employ him?

A. We hoped that they would hire one, and they had asked if we had any objections to him, and we certainly didn't have any objections to him.

Q. You knew Mr. Ardery?

A. At that time I don't believe I had met him.

Q. Do you know what his relationships theretofore were [fol. 387] with the public power?

A. When I heard of his name, I was told of his position.

Q. What was it?

A. As I understand it, he is the attorney for the Kentucky Statewide Cooperative Association. I don't know if that's the title, the official title, but——

Q. Now, Mr. House, who prepared these letters, formal requests for and formal commitment of TVA power to the cooperative, and then the cooperative power to the municipalities?

A. Now which formal letters are you referring to?

Q. Well, they are included in the subsequent papers listed by TVA here, and I'm particularly talking about 71, 72, 76, 77, 79, of the list of papers, which was filed by TVA.

A. Well, 71 was a letter from the cooperative. I would have to look at those particular documents, but a general statement——

Q. Well, let's just go into those papers now.

A. All right.

Q. I show you letter of Mr. E. J. Hardin, Mayor of Tazewell, to Mr. Ralph Miner, August 14, 1963; letter of Mr. Miner to Mr. House, August 26, 1963; and memorandum from Mr. House to Mr. Button dated August 27, 1963. [fol. 388] Do you recall this exchange of information?

A. Yes.

Mr. Rowntree: File that as Exhibit 23.

(The documents referred to were marked for identification as Collective Ex. No. 23, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. That first letter of August 14, 1963, by Mr. Hardin to you, to Mr. Miner, reads:

"This is to inform you that the City of Tazewell proposes to acquire or construct an electric distribution system to furnish service to Tazewell and such other fringe area as is most economically feasible.

"Counsel has given me an opinion that this action is fully authorized under the Tennessee Code and that Powell Valley Electric Cooperative under applicable law, both state and federal, is obligated to provide power and energy at appropriate wholesale rates for use in such a distribution system when acquired or constructed.

"This is to request that you confirm to us your ability and willingness to provide the Tazewell electric system with power as it is ready for service."

Then the next letter of August 26, 1963, from Mr. Miner to you, reads, quote:

[fol. 389] "We are enclosing copies of a letter from the Mayor of Tazewell, Tennessee. In this letter, he sets forth his intention of buying out the existing power distribution system and requests that we furnish power.

"It is our understanding that they want this Cooperative to operate and maintain the system and supply the electrical energy through our present distribution system by interconnecting the two systems. We understand further that the Cooperative will bill each consumer connected to the city's system at the same rate as the present consumers are billed with a possible exception in the case of the small user of energy.

"In the light of the above, we request that you confirm to the Cooperative the willingness and ability of TVA to furnish adequate wholesale power to enable us to serve this system."

And the memorandum from you to Mr. Button dated August 27, 1963, transmits a copy of this last—of these other two letters to Mr. Button. The second paragraph of that memorandum states, quote:

> "You will note in the last paragraph of letter, Miner requests that TVA write the cooperative a letter regarding power supply. You will recall we agreed to sending such a letter at our meeting with Messrs. [fol. 390] Miner and Cridlin in my office on June 14, 1963."

Mr. House, you recall that that meeting of June 14, 1963, was the one that we had no memorandum on?

A. That's right.

Q. And so at that meeting, it appears, does it not, that it was agreed upon the exchange of letters to commit the supplying of power?

A. Yes, sir.

Q. That was the meeting at which there was no representative of the cities present?

A. That's correct.

Q. Now there was no formal response to this letter of Mr. Miner to you of August 26, 1963, was there?

A. I'll have to review that.

I don't know. This 74—I don't recall these others—74 is a letter from me to Miner. I don't recall. I don't have notes on it.

Q. All right, sir.

A. I was under the impression that we gave them a letter, but I'd have to look through the file there.

Q. All right, we'll go to 74, which is a letter addressed by you to Mr. Miner dated August 30, 1963, and will you read that letter, please, Mr. House, just the body of it?

A. "This is to confirm arrangements made earlier this month for a conference to discuss possible service to Taze- [fol. 391] well and New Tazewell.

"We plan to meet you and Mr. Ardery in my office at 418½ Union Avenue, Knoxville, on Thursday, September 5, 1963, at 10 a.m., EST.

"I am looking forward to seeing you and meeting Mr. Ardery next Thursday."

Q. So apparently there was no formal response to the previous request?

A. Not at this time.

Q. Yes, sir.

A. Because, as brought out in the other exhibit, we wanted to wait until we met with Mr. Ardery.

(Mr. Rowntree: We ask that this letter be filed as Exhibit 24.)

(The document referred to was marked for identification as Exhibit No. 24, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Mr. House, do you recall why there was no formal response at that time to the request of the cooperative, why a meeting was set up?

A. I don't recall any particular reason except the course of events, the cities had employed an attorney, and the attorney wanted to meet with us.

Q. Do you recall whether or not there was some question [fol. 392] about the appropriateness and the language of the letter of Mr. Miner to you dated August 26, 1963?

A. I don't recall that there was any question as to whether it was appropriate or not. All I recall was that we thought it would be better to wait and get everybody together.

Q. Then I show you a letter from you to Mr. Ardery dated September 9, 1963, and that letter—I'll ask you to file that as Exhibit 25.

(The document referred to was marked for identification as Exhibit No. 25, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. That letter indicates, does it not, Mr. House, that a meeting was held on September 5, 1963, which was attended by Mr. Ardery?

A. That's right.

Q. And representing the TVA were Mr. Button, Mr. Wells, Mr. Reidinger, Mr. Drum, Mr. House, is that right?

A. That's right.

Q. Now was there a discussion about this REA bulletin 1-7 that you mentioned in that letter?

A. I don't recall whether there was a discussion of that bulletin or not. I know there was—the bulletin was mentioned, and we didn't have a copy in our office, and I got [fol. 393] a copy of it, but I don't—I don't even remember now what that bulletin is.

Q. You don't remember the subject of the bulletin?

A. No, I don't remember the subject matter, and I don't remember—I'm sure it was mentioned, or I wouldn't have sent him a copy, but I don't remember the subject matter or how much discussion was on it.

Q. Do you recall whether or not the bulletin covers the—what funds the rural electric cooperative, what purposes a rural electric cooperative can use its general funds for?

A. I don't recall the subject matter at all.

Q. Was there a discussion in this meeting concerning whether or not the municipal systems in Tazewell and New Tazewell could be built or constructed with the general funds of the cooperative?

A. I don't recall.

Q. Do you recall whether or not there was discussion in this meeting as to whether the cooperative should use the language contained in its letter of August 26, 1963, to you included in Exhibit 23 where it says that "the cooperative to operate and maintain the system"?

A. I don't recall that that was discussed. It could have been, but I don't recall that it was one of much discussion, [fol. 394] if it was even discussed at all.

Q. Was there any problem in the minds of anyone present at that meeting as to whether or not the cooperative could operate and maintain the system?

A. For the towns of——

Q. Yes, sir.

A. As I recall, there was none.

Q. I show you, Mr. House, a letter, September 11, 1963, from the two mayors of—mayor of Tazewell, Mr. Hardin, and the mayor of New Tazewell, Mr. DeBusk, to you.

A. To Mr. Miner?

Q. To Mr. Miner, I'm sorry. Letter of September 13, 1963, from Mr. Miner to you, memorandum of yours to Mr.

Button dated September 16, 1963, and letter from you to Mr. Miner, September 23, 1963.

Do you recall this exchange of letters?

A. Yes, sir.

Q. I'll ask you to file that as Collective Exhibit 26.

(The documents referred to were marked for identification as Collective Ex. No. 26, and filed as Exhibit to this deposition.)

By Mr. Rowntree:

Q. It looks like we go here back through the motions that were started up in the last series of letters. Do you observe, [fol. 395] Mr. House, that that letter, September 11, 1963, from the two mayors to Mr. Miner is identical with the previous letter from the Tazewell mayor, part of Exhibit 23, except that it is by both towns instead of just Tazewell?

A. It appears to be the same with that exception.

Q. And the letter of Powell Valley manager, Mr. Miner, to you of September 13, is pretty much identical with the letter of August 26, 1963, contained in Exhibit 23, except that there is some slight difference in language. Here the cooperative leaves out the language that the cooperative is "to operate and maintain the system."

A. However, it adds, "we should make arrangements to operate it for them."

Q. What they ask there in that last paragraph is if the cooperative should make arrangements to operate it for them, would TVA be willing and able to provide the power?

A. That's right.

Q. And in your transmittal letter, your memorandum to Mr. Button of September 16, you do state that, "we advised them that TVA would write the cooperative concerning power supply after receipt of the joint letter from the towns."

A. That's right.

Q. And so this is really just a formal carry through of what was agreed to at the meeting?

A. That's right.

[fol. 396] Q. And really this is a carry through of what was agreed on between the cooperative and the TVA back at the June 14th meeting?

A. June 14th?

Q. Yes.

A. Well, I don't recall all that was discussed at the June 14th meeting, but it could have been along the same line.

Q. And then in your letter in Exhibit 26 to Mr. Miner dated September 23, you make the formal commitment of TVA power.

A. That's right.

Q. I show you a letter dated September 24, from Mr. Miner to the mayors of the two towns, Mr. Hardin and Mr. DeBusk. Now what is the purpose of that letter, Mr. House?

A. Well, this is a letter from Mr. Miner to the two mayors.

Q. This just makes the formal commitment?

A. That's right.

Q. That's been agreed upon?

A. That's right.

Mr. Rowntree: File this letter as Exhibit No. 27.

[fol. 397] (The document referred to was marked for identification as Exhibit No. 27, and filed as exhibit to this deposition.)

(At 1:05 p.m., the deposition was adjourned to be reconvened at 2:15 p.m.)

[fol. 398] Afternoon Session

(At 2:15 p.m., the taking of the depositions was continued as follows:)

C. Wilson House (Resumed), having been previously sworn, was examined, and deposed further as follows:

Direct examination (Continued).

By Mr. Rowntree:

Q. Now, Mr. House, did you learn that the lines of Kentucky Utilities to buildings in the Tazewell-New Tazewell area were being cut by somebody, and lines transmitting, distributing Powell Valley power were being substituted for those lines?

A. I didn't learn that the lines were being cut; I learned that some customers that had been served by KU were being served by the cities. I didn't know the—actually whether the lines were cut or how they were hooked on.

Q. Well, how did you assume that the KU—that the Powell Valley power was being substituted for KU power?

A. Well, you don't have to cut the line; you can disconnect it without cutting it. I didn't try to assume how they were. You just put in a meter and a service wire and connect the customers' wires to the city's lines and disconnect it from KU's.

Q. So you were——

[fol. 399] A. You can do that. I don't know how it was actually done in the field.

Q. You knew somebody was going to have to get in there and actually, physically use self help to disconnect that Kentucky line?

A. Certainly.

Q. In order to substitute the Powell Valley power?

A. Yes.

Q. And this was done without resorting to any Court for determination of the rights of the parties, is that right?

A. As far as I know, it was.

Q. I notice that Powell Valley listed number 93 among its papers which is notes on meeting held November 27,

1963, between representatives of Tennessee Valley Authority, Powell Valley Electric Cooperative, and the cities of Tazewell and New Tazewell, Tennessee. Do you recall any such meeting as that?

A. What date was the meeting?

Q. November 27, 1963?

A. November 27, 1963?

Q. Yes.

A. I don't recall that meeting.

Q. You have no notes concerning such a meeting?

A. No.

[fol. 400] Q. I notice that——

A. Who was it between again?

Q. Tennessee Valley Authority, Powell Valley Electric Cooperative and the cities of Tazewell and New Tazewell.

A. No, there's November the 27th '62, but I don't have any such record of November 27, '63.

Q. All right, sir. Now I notice Powell Valley lists as number 94 notes on meeting held December 18, 1963, between representatives of Powell Valley Electric Cooperative, the cities of Tazewell and New Tazewell, Tennessee, and Mr. R. H. Cottrell, Jr., Engineer, Nashville, Tennessee. I don't suppose you attended that meeting?

A. No, I did not.

Mr. Pedersen: What was the date of that meeting?

Mr. Rowntree: That was December 18, 1963.

By Mr. Rowntree:

Q. Did you receive any communication concerning that meeting?

A. No, I'm sure that I didn't.

Q. Do you recall—do you know what Mr. Cottrell's connection was with the matter at this particular time, December 18, 1963?

A. No, I do not.

[fol. 401] Q. Mr. Cottrell was the engineer in Nashville who was asked to give a——

A. Yes, he was the one.

Q. To give a cost of an appraisal.

A. Yes, that's right.

Q. Do you know anything that transpired with respect

to Mr. Cottrell during this particular time of December, 1963?

A. No, not unless it was—I'll have to check on the dates—not unless it was a changing of the transformers at the Tazewell substation.

Q. Why should Mr. Cottrell be concerned with that?

A. Mr. Cottrell was the co-op's engineer on making changes in the Tazewell substation.

Q. Was he concerned only with the Tazewell substation?

A. As far as I know.

Q. Insofar as you know, his only connection then as far as that time was with respect to changes being made in the substation?

A. That's right, and we have some correspondence in connection with changing substations, copies, with Cottrell and they did not pertain to anything except changes at the substation.

Q. Would you furnish a copy of that letter, and I believe [fol. 402] perhaps it would be number 95 listed by Powell Valley which is letter from R. H. Cottrell, Jr., Engineer, to C. Wilson House dated February 3, 1964.

A. I don't have the copy here.

The Witness: Do you have any objection?

Mr. McCarthy: I don't know whether we will furnish it or not. I'll have to see it.

Mr. Rowntree: It ought to be in the file.

The Witness: What is that date now?

Mr. Rowntree: This is listed by Powell Valley, number 95, February 3, 1964.

Mr. Pedersen: From whom to whom?

Mr. Rowntree: It's from Cottrell to Mr. House.

By Mr. Rountree:

Q. Now, Mr. House, I show you a letter dated April 3, 1964, from Mr. Miner, Manager of Powell Valley to Norman M. Clapp, Administrator, Rural Electrification Administration, Washington 25, D. C., April 3, 1964, to which is attached a memorandum from you to Mr. Button dated April 10, 1964, and your memorandum to Mr. Button states that you attach a copy of this April 3rd letter of Miner to Mr. Clapp.

Do you know what this was all about? What was the background of this?

A. I didn't see this letter until after it was sent out.

[fol. 403] Q. Yes, sir.

A. I didn't know anything about it beforehand, and——

Q. I didn't ask you that, Mr. House. Why do you state that?

A. Well, I understood your question, did I not, about the letter?

Q. Did you know about the background?

A. Oh, no. I didn't know about the background.

Q. Are you sure you did not see the letter before it went out?

A. I'm sure I did not read the letter until after it went out. A copy was sent to me by Mr. Miner.

Q. In the regular mail?

A. Yes.

Q. Now the letter deals with complaints made by Kentucky Utilities to REA, does it not, concerning Powell Valley's activities?

A. Let me read this, I'm not too familiar with this letter. That's right.

Q. Now did not Mr. Miner get approval of TVA of this letter before it was mailed out?

A. Not to my knowledge, he did not.

Q. Did you have any other communication with Mr. Miner

[fol. 404] on the date this letter is dated?

A. Not to my knowledge.

Q. I would point out that there was a letter referred to by Powell Valley in its list, number 109, speed letter from Ralph B. Miner, Manager, Powell Valley to C. Wilson House, District Manager, TVA, dated April 3, 1954. TVA did not list that letter. I wonder if you recall what that letter was about?

A. No, I do not.

Q. What is a "speed letter", I wonder? Do you have any idea?

A. I think it's an informal memorandum form. I'm not sure.

Q. I also notice that Powell Valley listed number 111, not listed by TVA, letter from Thomas A. Pedersen, Assistant General Counsel, TVA, to Ralph B. Miner, Manager of

Powell Valley, also dated April 3, 1964. You wouldn't have any knowledge of what that was?

A. I wouldn't recall that, no.

Q. Now turning to this memorandum and letter of April 3, from Mr. Miner to Mr. Clapp, I'd like to file that as Exhibit 28.

(The document referred to was marked for identification as Exhibit No. 28, and filed as exhibit to this deposition.)

[fol. 405] Mr. McCarthy: Are the two numbers being filed as a joint exhibit?

Mr. Rowntree: Joint exhibit, collective.

By Mr. Rowntree:

Q. Now you will observe the second paragraph of 92— of the letter of April 3, 1964, quote:

> "In paragraph nine of his letter, Mr. Fairman says 'contractors, which were engaged in doing construction work for Powell Valley' started construction to connect K. U.'s customers to Powell Valley's lines. This is a misleading statement. While the contractor *was* doing some work in the area for the Cooperative, the work Mr. Fairman refers to had nothing to do with the Cooperative. I understand this work was done under a contract between the contractor and the municipalities of Tazewell and New Tazewell."

Mr. House, that was not strictly accurate language, was it?

A. I don't know the circumstances of the contract or what the contractor was doing. I was not familiar with it at all.

Q. Well, you were advised, as you testified before, that lines of KU were being disconnected or cut and Powell Valley power was being put in by new lines to these buildings up there, and did you not understand that that's what [fol. 406] the subject matter was here in this paragraph I just read?

A. Yes, it certainly refers to serving customers in Tazewell and New Tazewell, the way I understand it.

Q. And the statement that "the work Mr. Fairman refers

to had nothing to do with the cooperative", would you agree with that statement in the light of all of these other memos and so forth that we have put into the record here?

A. Well, I think it would be—we'd have to have a definition on what you mean by "refers", on what it means by "refers to".

Q. Well, he's talking about the work going on, and it's obvious from the language used in the paragraph what he's talking about, is it not, Mr. House, connecting KU's customers to Powell Valley and talking about Tazewell and New Tazewell?

A. Well, the way I understand it means here that the customers were being connected to the lines of Tazewell or New Tazewell, and the actual work of putting lines in and connecting the customers was being done under contract between the contractor and the municipality.

Q. And the words that the cooperative had nothing to do with that, is that accurate?

A. Well, I don't know whether the cooperative had anything to do with the contract or not.

Q. After all of these meetings you had had with the co-
[fol. 407] operative, with and without the towns being present, arranging all of these things, would you say that this language is accurate?

A. Well, if they are referring to the actual contract, the contractor works for a certain company or certain outfit, and that's what I gathered from this letter what he was referring to.

Q. He was kind of giving a whitewash brush to this complaint of Kentucky Utilities, wasn't he, is that not right?

A. Well, I don't know.

Q. That's the impression you got from it anyway, isn't it?

Mr. McCarthy: Don't you think that's something you ought to argue with the co-op, not with Mr. House?

By Mr. Rowntree:

Q. Well, let's ask this. Did TVA make any response of its own to this complaint of Kentucky Utilities to Mr. Clapp after you received this letter?

A. No, to my knowledge.

Q. Was any effort made to clarify what the full situation

was in Tazewell and New Tazewell besides the writing of this letter?

A. Not that I know of.

Q. Did the interest of the REA arise again about this matter or do you recall?

[fol. 408] A. I don't recall. I don't know whether it did or not.

Q. I show you a letter, Mr. House, from you to Mr. Miner dated May 5, 1964, in which you send copies of map showing customers and lines of TVA and power distribution as of July 1, 1957, in Claiborne County, Tennessee, and you stated; quote:

"Our Legal Division says they do not object to you showing this map to REA if you want to."

Do you know what—why that map was sent up with this purpose of showing it to the REA at that time?

A. The map was not sent up for the primary purpose of showing it to REA. It was a map which we had prepared with the—all of the field information being given by the cooperative and other power distributors in the area. Mr. Miner asked did we have any objections if he showed the map to REA, and we said that we did not, but it was not prepared for that purpose.

Q. Was this in response to a telephone call to Mr. Miner or to you or do you recall?

A. As I recall, there was a telephone conversation.

Q. Do you know why Mr. Miner wanted to show it to the REA?

A. No, I don't know.

Mr. Rowntree: Let's file that as Exhibit 29.

[fol. 409] (The document referred to was marked for identification as Exhibit No. 29, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Powell Valley lists number 115 which TVA does not list, speed letter from Ralph B. Miner, Powell Valley to C. Wilson House, District Manager, dated the same date as this list exhibit, May 5, 1964.

Do you recall what that letter is about?

A. No, I do not recall definite what it was about.

Q. Do you recall whether it had anything to do with this REA request or REA being supplied with the map referred to in Exhibit 29?

A. I don't believe it was. I think it referred to the maps, but not that specific one.

Q. Now, Mr. House, had TVA been providing map service to Powell Valley concerning the preparation of the maps of Claiborne County, Tazewell, New Tazewell area in recent months?

A. Yes. Wait, read that back.

(The last question was read by the reporter.)

The Witness: I don't think my answer—I would like to amplify it.

By Mr. Rowntree:

[fol. 410] Q. All right, sir.

A. Between Powell Valley and TVA, we have prepared maps jointly. They are for our purpose as well as the co-op's.

Q. Let's go to 89. Do you remember receiving this letter, Mr. House?

A. Yes.

Q. The letter, March 18, 1964, from Mr. Miner to you, and I'd like to file that as Exhibit 30.

(The document referred to was marked for identification as Exhibit No. 30, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Mr. House, could you tell us whether the map referred to in that letter which was sent here to you by Mr. Miner showed customers of Powell Valley in the New Tazewell and Tazewell area as of July 1, 1957, and as of April 20, 1958, showing the location of those customers?

A. No, the July 1 of '57, and the August 21 of '58, does not refer to the map of the Tazewells: It refers to the topographic map of Claiborne County.

Q. Were there two maps sent down with that letter?

A. Yes, sir. Well now, let me correct that. There was one

map of Tazewell, and there were several sheets of topographic maps. It was not one map of Claiborne County; it was the topographic sheets on which the customers were shown.

[fol. 411] Q. And were circles shown on that map showing the location, general location of those customers?

A. No, sir. Which one are you referring to, the map of Tazewell or the topographic maps?

Q. Topographic maps.

A. There were dots showing the customers as of the latter part of '57 and '58, and on those maps were circles around the dots of those customers who were served after July 1, of '57.

Q. And there was also inclosed a map of the Tazewells?

A. Right.

Q. And were there a list of customers also sent down with that?

A. That is right.

Q. Then I notice in the 5th paragraph of this letter, Exhibit 30, quote:

> "The only other note I had was the question, 'Did we provide any service to the towns prior to July 1, 1957?'
>
> "According to our records, the answer to this is 'No'."

Had you asked Mr. Miner to provide information as to what customers of Powell Valley existed as of—in the towns—existed as of July 1, 1957?

[fol. 412] A. Read that back, please.

(The last question was read by the reporter.

A. Yes, we asked Powell Valley and this is what they furnished on this map, for the customers in Tazewell and New Tazewell, and we also asked were any of those customers prior to July 1, '57, actual municipalities such as water pumping or in the name of the cities.

Q. You are talking about municipal planning?

A. That's right, municipal accounts, yes.

Q. And there was no service to municipal plants at that time?

A. That's right, from this answer.

Q. Was there any service to municipal plants at any later time?

A. I don't know the date, but as I recall there were some street lights served by Powell Valley after July 1 of '57. I don't know of any other service. There could have been, but I don't—didn't ask that question when we were preparing the maps.

Q. Do you recall approximately how many customers were served in the towns of Powell Valley at the time of July 1, 1957?

A. No, I prepared the maps, but I don't recall the number.

[fol. 413] Q. There were quite a limited number, very few, is that not right?

A. Well, I'd rather—I have the record. I'd rather look it up than to say whether they were limited or not.

Q. Mr. House, I show you a list attached to the answers of Powell Valley Electric Cooperative to interrogatories, being Exhibit 1 to those answers, I show you a list of twenty customers under the heading "Electric Power Consumers Served by Powell Valley Electric Cooperative Within the Corporate Limits of Tazewell, Tennessee, as of July 1, 1957."

Is that about the size of the list furnished to you in this letter?

A. I assume that it was, because they furnished us the information that we prepared the maps, they furnished the list. I would certainly assume that they would correspond.

Q. And here as Exhibit 5 to the answers of Powell Valley, we find a list of eight customers under the heading "Electric Power Consumers Served by Powell Valley Electric Cooperative Within the Corporate Limits of New Tazewell, Tennessee, as of July 1, 1957."

Do you recall that is about the size of the list that they furnished you?

A. I would certainly think it would be.

Q. Do you know the number of customers that Kentucky Utilities was serving in Tazewell and New Tazewell?

[fol. 414] A. No, I do not.

Q. At July 1, 1957?

A. No, I do not.

Q. Mr. House, I show you a letter dated March 26, 1954, from you to Mr. Miner, quoting:

> "Confirming our telephone conversation this morning, I am sending you under separate cover prints of maps of 'Tazewell and New Tazewell' on which are shown the cooperative's and cities' customers and lines.
>
> "These maps were prepared from the information you furnished us recently. As requested, I am returning the maps you sent us.
>
> "If will be appreciated if you will check the maps and advise me of any changes, corrections, or additions which should be made."

Mr. Rowntree: We file as Exhibit 31 that letter.

(The document referred to was marked for identification as Exhibit No. 31, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Mr. House, was that map prepared in connection with this lawsuit?

A. It was.

[fol. 415] Q. Prepared by TVA?

A. The information was obtained by the cooperative and the maps were prepared by TVA from the information received from them.

Q. Do you know who prepared the map in TVA?

A. I do.

Q. Who was that?

A. I did.

Q. You actually?

A. Actually, and with the help of Jim Ward.

Q. Who is Mr. Ward?

A. He works in my office, administrative assistant.

Q. And so you used the information supplied with the last letter of Mr. Miner?

A. That's correct.

Q. On Exhibit 30 and prepared this map?

A. That's right.

Q. And did you also get information from Lafollette Electric Department concerning customers served by them in Claiborne County?

A. We did.

Q. I show you a letter, Mr. House, dated April 6, 1964, from you to Mr. Leonard Watson, Engineer, City of Lafollette, Electric Department, asking for information to be inserted on a topographical map which you inclosed con-
[fol. 416] cerning customers of Lafollette Electric Department.

A. Yes, sir.

Q. Do you recall this?

A. Yes, sir.

Mr. Rowntree: We ask that that be filed as Exhibit 32.

(The document referred to was marked for identification as Exhibit No. 32, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Did Lafollette Electric Department furnish that information back to you?

A. They did.

Q. And did you prepare a map—did you use that information in connection with the preparation of maps?

A. Of a map, yes, sir.

Q. A map, just one map?

A. One map, yes, sir. I did not prepare that map.

Q. Who prepared that?

A. James W. Ward, Jr., prepared the map, and I assisted him some, but very little.

Q. Mr. House, I show you merorandum from you to Mr. Button dated May 5, 1964, stating, quote:

> "I am sending to you under separate cover one print each of maps which we have prepared for the Division
> [fol. 417] of Law for use in the Tazewell case. We obtained the field information from Powell Valley and Lafollette."

And then the letter May 28, 1964, from you to Mr. Miner, stating:

> "In response to your telephone conversation today with our Jim Ward, we are enclosing four maps of the cities of Tazewell and New Tazewell showing Powell Valley Electric Cooperative's customers and

power lines as of July 1, 1957, August 6, 1959, November 7, 1963, and after November 7, 1963."

Do you recall these communications?

A. Yes, sir.

Mr. Rowntree: I'd like to file those as Exhibit 33.

(The documents referred to were marked for identification as Exhibit No. 33, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. Were the maps referred to in both of these communications the same?

A. Yes, with the exception the one referred to in the memo of May the 5th to Mr. Button also included the map of Claiborne County.

Q. How did you obtain the information with respect to [fol. 418] the maps referred to in the May 28 letter to Mr. Miner? Was it just lists of customers in Tazewell and New Tazewell?

A. No, that was obtained by having one map showing Tazewell and New Tazewell, the cooperative indicated the customers and had numbers on the—each dot or circle, attached to that a list by the numbers giving the name of the customer and when they were connected. From that you could determine those that were served as of these dates.

Q. Now the information provided by Lafollette Electric Department was used solely on the Claiborne County map, is that right?

A. That's right, yes, sir.

Q. Were there—there were four maps concerning Tazewell and New Tazewell?

A. That's correct.

Q. And one overall map of Claiborne County?

A. Correct.

Q. Giving the lines or service of customers of both Lafollette and Powell Valley?

A. Yes.

Q. Mr. House, I notice that Powell Valley has listed a

number of communications not listed by TVA, and I refer particularly to Powell Valley's numbers 116, letter from Ralph B. Miner, Powell Valley, to Lew Wallace, TVA Legal Division, dated May 14, 1964;

[fol. 419] Number 117, letter from Charles J. McCarthy, General Counsel, TVA, to Miner, Powell Valley; dated May 15, 1964;

119, letter from Thomas A. Pedersen, Assistant General Counsel, TVA, to Ralph B. Miner, Powell Valley, dated June 12, 1964;

120, letter from Ralph B. Miner, Powell Valley to Lewis E. Wallace, TVA Legal Division, dated June 17, 1964;

121, letter from Thomas A. Pedersen, Assistant General Counsel, TVA, to Ralph B. Miner, Powell Valley, dated June 22, 1964;

And number 122, letter from Thomas A. Pedersen, Assistant General Counsel, TVA, to Ralph B. Miner, Powell Valley, dated June 25, 1964.

Was Powell Valley getting some legal advice from the TVA, do you know?

A. To the best of my knowledge, I haven't seen copies of any of these.

Q. You just don't know anything about that?

A. Afraid I don't.

Q. So at the time that this lawsuit arose in November, 1963, you were content to—and you had authority to commit the TVA to supplying power through the cooperative in Tazewell and New Tazewell to customers formerly served by Kentucky Utilities, is that right?

[fol. 420] A. That's what we so wrote them, yes, sir.

Q. Even though Powell Valley was still under an agreement with Kentucky Utilities not to take customers from Kentucky Utilities and in spite of your previous concern about that agreement, is that right?

A. The customers were being served by Tazewell and New Tazewell.

Q. So it's your position that the TVA and the cooperative had successfully worked around that agreement by these arrangements, is that right?

Mr. McCarthy: I think that question is objectionable in

form and it's asking for legal conclusion. I think I will instruct the witness not to answer that question.

By Mr. Rowntree:

Q. Mr. House, do you abide by the instructions of counsel?

A. I do.

Q. Now, Mr. House, we have talked here quite a bit about this agreement between Kentucky Utilities and the cooperative, and what was your attitude with respect to that agreement at the time of the bringing of this lawsuit in November of 1963?

A. Well, the position of that agreement as well as the other matters like that, was up to my superiors in Chatta-
[fol. 421] nooga with the advice of the Legal Division to determine, and I didn't try to make a determination on my own.

Q. Well, you weren't even satisfied in your own mind then that the agreement was not still effective to bar TVA power?

A. I didn't try to determine it in my own mind. I figured that that was a policy matter and a legal matter that the District Manager was not supposed to make a determination of, so I didn't make it.

Q. Were you advised by these authorities that the arrangements that were made under all of these memoranda was sufficient to eliminate that problem of the Kentucky Utilities agreement?

A. I was convinced by the commitments we made that it was satisfactory for Powell Valley to furnish power to the Tazewells to serve these customers.

Q. And it was the understanding that Powell Valley Cooperative was to operate and maintain this distribution system in the two municipalities?

A. That was what we understood the way it would be handled.

Q. After it was originally handled by the municipalities?

A. That's right. I would like to say there, operate and maintain for the municipalities.

[fol. 422] Q. Well, it was operate and maintain for the

customers of the system in Tazewell and New Tazewell, was that not right?

A. No, I wouldn't consider it that. The lines extended to the customers were the property of the City of Tazewell and New Tazewell, so I would consider that the cooperative was operating them for the towns.

Q. Mr. House, was the purpose of having the municipalities establish these systems initially and then have them operated and maintained by the cooperative to get around the agreement of 1952?

A. As I recall our discussions with them, and I believe the exhibits will show that we told the co-op and the towns they should get together and decide which would be the better way, how they would prefer they be served, and in one of the meetings, they advised us that they wanted to go the route of the municipalities constructing the system.

Q. And the cooperative gave you that advice?

A. That advice, as I recall, was given at a meeting with the coopertaive and the representatives of the cities.

Q. By the representative of the cooperative?

A. I don't recall who actually made the statement. It was made at the meeting, though, as I recall.

Q. Referring to Exhibit 16 and that paragraph after the [fol 423] listing of the participants at that meeting, Mr. Miner points out the reasons there, does he not?

A. Yes.

Q. For the municipalities to take over the system?

A. Yes.

Q. To start the systems, and there were two reasons expressed there, were there not?

A. It states here that it was the cooperative's thought to have a duplicate system.

Q. Yes, and we talked about that before?

A. Yes.

Q. And we also talked about your parenthetical statement there?

A. Yes.

Q. That it was not even mentioned to the cities?

A. That's right.

Q. That there was this territorial agreement of 1952. Do you recall that?

A. Yes.

Mr. Rowntree: All right, sir, that's all.

Cross-examination.

By Mr. McCarthy:

Q. That 1952 agreement was not even mentioned at this meeting at all?

[fol. 424] A. That's right.

Q. It was not advanced by Powell Valley as a reason?

A. No.

Q. I believe you testified, Mr. House, that you had no responsibility whatever for determination of policy, is that correct?

A. That is right.

Q. Would any so-called gentlemen's agreement with a neighboring utility be within your jurisdiction at all?

A. No, it would not.

Q. Who would know as to whether such agreements existed?

A. I would say the Manager of Power, and Director of Power Marketing.

Q. What is your understanding of the term "gentlemen's agreement"?

A. Well, my understanding of a gentlemen's agreement is an agreement that two people agree to without being in writing or a contract.

Q. Do you actually know whether any so-called gentlemen's agreement existed between TVA and any of the neighboring utilities?

A. I do not.

Q. Will you please refer to Exhibit 3, that was a meeting [fol. 425] with representatives of the Claiborne County Chamber of Commerce?

A. That's right.

Q. Those people—are those people official representatives of Tazewell and New Tazewell?

A. I understood that they represent the Claiborne County Chamber of Commerce, and they were interested in getting lower cost power for the area, including the towns.

Q. This was no official delegation from the cities then; this was just some interested people?

A. That's right.

Q. Did you know that the general—that the TVA Board had advised official representatives of Tazewell earlier than this date that TVA did have legal authority to serve them?

Mr. Rowntree: Object to the form of the question.

By Mr. McCarthy:

Q. Let me direct your attention to Exhibit 17, memorandum of Mr. Button to the files. Will you read the second full paragraph of that memorandum?

Mr. Rowntree: Object to anything from this exhibit, because this witness was not present at the meeting.

By Mr. McCarthy:

Q. Had you seen copies of this memorandum?

[fol. 426] A. As I recall, I had not seen copies of the memoranda.

Q. Will you check the distribution list on that and see whether you had received a copy of it?

A. Well now, are you talking about the December 5th——

Q. I'm talking about the December 5th memorandum.

A. Oh, I received a copy of that, yes. I thought you were referring to the 1960.

Q. Would you read into the record the second paragraph of that memorandum?

Mr. Rowntree: Which memorandum are you talking about?

Mr. McCarthy: Memorandum, December 5, 1960.

Mr. Rowntree: Exhibit what?

The Witness: 17.

By Mr. McCarthy:

Q. Would you read it into the record?

A. The second paragraph:

"It was noted that early in 1960, representatives of these towns——"

Mr. Rowntree: Still object to the reading of anything from this memorandum on the basis of hearsay, and this concerns a meeting at which the witness was not present.

[fol. 427] By Mr. McCarthy:

Q. All right. Now will you read that into the record.

A. "It was noted that early in 1960, representatives of these towns met with the TVA Board to discuss the possibility of getting TVA power. At that time they were told that we did not consider them to be outside the area in which TVA power could be supplied but because of their size we doubted whether they would have a feasible operation. The possibility of being served by the cooperative in the area was being considered by the towns."

Mr. Rowntree: Object on the hearsay rule too, if I didn't mention it before.

By Mr. McCarthy:

Q. Well now, Mr. House, at the time this group from the Chamber of Commerce came to see you, was the failure to take a firm position as to whether TVA could legally serve Tazewell anything more than normal restraint that one exercises in dealing with a volunteer group?

Mr. Rowntree: Object to the form of the question, also leading.

By Mr. McCarthy:

Q. You may answer the question.

A. How about reading the question back to me.

[fol. 428] (The last question was read by the reporter.)

Mr, Rowntree: Object on the ground of calling for a conclusion.

The Witness: No, it was not.

Mr. McCarthy: Just so there will be no doubt in the record at this point, Mr. Rowntree, let me state for the record that as general counsel of TVA, I advised the TVA Board—

Mr. Rowntree: I object to this as evidence.

Mr. McCarthy: —that it clearly had authority to serve Tazewell and New Tazewell on the earliest date on which this question was raised.

Mr. Rowntree: As I have stated, we object to that statement as evidence.

Mr. McCarthy: No further questions.
Mr. Rowntree: That's all.
I should ask Mr. House this question.

Redirect examination.

By Mr. Rowntree:

Q. You didn't mean to state on examination, direct examination by your own counsel, that you did not know about the agreements between Kentucky Utilities and Powell Valley at the time of the first meeting with the city council representatives of Tazewell and New Tazewell?

[fol. 429] A. I didn't remember that as being the question.

Q. You recall that you testified about not knowing about the gentlemen's agreements or something like that.

A. No, I testified that I didn't know of any gentlemen's agreement between TVA and any adjoining power company.

Q. But of course the contact between the TVA system and the surrounding power companies was generally between the distributor of TVA power, cooperative or municipality?

A. No, I'd say——

Q. And the private power company on the border of the TVA area. That's where the contact was generally—

A. No, most of the contact between TVA and the adjoining power companies, distributors, are not involved whatever.

Q. Well, there were constant questions arising around the perimeter of the TVA service area, were there not, as to territory, area?

A. We have not had any that I recall other than this case where there had been any—I haven't attended any meetings with the private power companies that I recall with the distribtuors.

Q. And that's because there were these agreements, is it not?

A. I don't know of any such agreements.

[fol. 430] Q. Well, there would naturally be questions of who would serve in the perimeter area, would there not, just in the normal course of business?

A. You'll have to ask the managers on that. I haven't been on those.

Q. Well now, Mr. House, you testified that your responsibility was to negotiate service contracts out in the field in your district.

A. Not contracts with individual customers.

Q. No.

A. It's contracts with the distributors of TVA power.

Q. But you were a prime agent of the TVA in dealing with these cooperatives and other distributors of TVA power, were you not?

A. Well, yes, the contacts, our relations covered by a power contract between TVA and the distributors, yes.

Q. You were naturally the party through whom the TVA would meet any complaint out in the field in your distract with respect to area conflicts between your distributor and the private power company?

A. I don't recall whether I've sat in on any such meetings.

Q. And is it not true that the reason for that is that these agreements were constantly abided by up until the time [fol. 431] of this case?

A. I don't know of any such agreements.

Q. Well, you knew about the Powell Valley agreements with Kentucky Utilities certainly.

A. I did.

Q. And those are the ones that are important in this case, aren't they?

A. I would certainly say so.

Mr. Rowntree: All right. Well, that's all.

Futher Deponent Saith Not.

C. Wilson House, By: Georgella Mankin.

Sworn to before me this the 11th day of August, 1964.

Gorgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal.)

[fol. 432] GABRIEL O. WESSENAUER, a representative of the Defendant, Tennessee Valley Authority, having first been duly sworn, was examined, and deposed as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?

A. G. O. Wessenauer.

Q. And may I ask your age, Mr. Wessenauer?

A. Now, let's see. I always try to forget that. I'm 58 almost; 57 I guess technically.

Q. Where do you reside?

A. Chattanooga, Tennessee.

Q. Is that more than one hundred miles from Knoxville?

A. Yes.

Q. What is your position?

A. I'm Manager of Power with the Tennessee Valley Authority.

Q. How long have you occupied that position?

A. Well, in the neighborhood of twenty years.

Q. That's almost the life of the TVA, isn't it?

A. Well, not quite.

Q. Could you state generally what your duties are in the office of Manager of Power?

[fol. 433] A. The Manager of Power is responsible for all of the power activities of TVA.

Q. During the consideration by Congress of the TVA Bond Act, did you give testimony before the Congressional committees?

A. Are you referring to the amendment to the TVA Act?

Q. Yes, sir.

A. Dealing with bond financing?

Q. That's right.

A. Yes, I gave testimony in that case.

Q. Were there certain maps presented during the course of your testimony—and I'll ask counsel if they have the three maps that we will refer to in the answers to interrogatories?

Mr. McCarthy: Yes, we have them there.

By Mr. Rowntree:

Q. And Mr. Wessenauer, I show you two small maps, I think there's one of them is entitled "Tennessee Valley Authority, Major Construction Projects, April, 1955"; and another of the small maps is entitled "The TVA System, Dams and Steam Plants, January, 1957,"; and then there is a map against the wall there, a large map colored in pink, blue and gray.

Do you recognize those as being maps that were pre-
[fol. 434] sented to the Congressional Committees during the course of the consideration of the Bond Financing Act?

A. Yes, these were maps that were used at various times during my testimony.

Q. Now I believe you testified before the House Committee in March of 1959, do you recall that?

A. Well, I testified in '59.

Q. Yes, sir.

A. I don't remember the exact date. I guess the record will show that.

Q. Do you recall that it was part of your testimony that the area serviced by TVA power had remained the same for approximately fourteen years, or since 1945?

A. Well, I recall discussing the fact that the areas served with TVA power by our distributors had remained fairly much the same over a period of that time. I think I pointed out the major acquisition took place in 1945 in upper East Tennessee.

Q. Do you recall what that had to do with?

A. That had to do with the properties of East Tennessee Power and Light Company, or Light and Power Company, I forget which, serving Bristol and Johnson City communities in that area.

Q. Was that any activity with respect to that company resulting from the action of the Securities and Exchange
[fol. 435] Commission, or do you recall?

A. Well, I believe the company was under an order from the Securities and Exchange Commission to divest itself of that property, that is the parent company was, and it was in connection with that that we worked out an acquisition.

Q. And was that in approximately 1945?

A. Yes, sometime in '45.

Q. Was that the last change in the area to your recollection?

A. No—well, it was the last major change. I don't recall, there might have been other changes of lesser scope.

Q. Do you recall testifying that there were good reasons why the area had not changed?

A. I don't recall that I did, no.

Q. I refer to the language at page 16 of the House hearings of the Committee of Public Works, March 10-11, 1959, quoting:

> "The point I want to make now, Mr. Mack, is that that has been the law for the last fourteen years and this area for good reasons has remained just as it is."

Does that recall to you that the House members were examining you about the then-existing power of TVA to extend its lines so far as economic transmission could be [fol. 436] accomplished from the hydroelectric plants?

A. I don't recall that particular passage, and I'd have to really look at the whole context to be able to answer your question.

Q. Yes, sir. Do you recall that the House members were pointing out that TVA at that time, before the passage of the Bond Act, had power to extend its lines so far as economical transmission could be accomplished from the hydroelectric plants?

A. Yes, I recall there was testimony on that.

Q. And do you recall that this statement I have quoted here was in response to that, and you are stating here, is it not true, that in spite of that power of TVA to extend its lines, they had remained the same for fourteen years for good reasons?

A. You have quoted the statement, and I don't have any reason to question it now.

Q. All right, sir. Now, Mr. Wessenauer, do you remember who prepared thees maps that we have looked at here?

A. I don't remember who the particular individual was who prepared them, but they were prepared for my use in connection with the hearings.

Q. Were they prepared by personnel of TVA under you?

A. They were prepared by personnel in TVA. We have [fol. 437] various units that would have provided service of this kind, so as to the question of under me, I'm not exactly sure.

Q. Did the distributors of TVA participate in the preparation of those maps?

A. No, sir.

Q. Now, Mr. Wessenauer, the TVA is not a distributor of power is it? Is not its function in the generating and transmission of power?

A. Well, our primary function is in generation and transmission of power. I think carrying of power distributes power, so in that sense it is a distributor too.

Q. Do you know where the information came from with respect to fixing the lines on these maps, and I will talk particularly about this large map, the colored map.

A. Well, the information basically was information which we had available to us in our files as to the general extent of the areas served by the individual municipal and cooperative distributors of TVA power, and the lines were intended to be an approximation of the extent to which their lines went geographically.

Q. Now there were—excuse me.

A. And they were the best information we had in our offices at the time the maps were prepared. They were intended to give the general picture of where the distributors were, municipal and cooperative distributors were car- [fol. 438] rying TVA power.

Q. So TVA had at hand maps or other presentation which showed the areas of these various distributors?

A. Well, they had maps that gave some indication of that, yes.

Q. And the information taken and presented on these maps came from those source primarily?

A. They were the primary sources, yes.

Q. Do you recall what specific maps were used to develop the information, particularly with respect to this large map?

A. No, I do not.

Q. Now if I'm not mistaken, Mr. Wessenauer, this large map was the map used at the committee hearings of the

House Committee on Public Works in the March, 1959 hearing.

A. Yes, this was the one used in '59.

Q. Will you state generally what the blue area on the map covers and what the pink area and the gray areas cover?

A. Well, the blue area was intended to delineate the drainage basin of the Tennessee River; the pink area was intended to delineate the extent of the service area of the distributors of TVA power, that is municipal and cooperative distributors of TVA power.

Q. The gray area is area not falling into either one of [fol. 439] those categories?

A. That's the background color.

Q. And the pink area, and the lines of the pink area would be defined by these outside souces that you mentioned, that TVA had at hand, with respect to the areas of the various distributors?

A. It was rough approximation based on the information then at hand which may have been a little bit old at the time. That was the best that was there at the time.

Q. Really any presentation or map of TVA existing at the time that had particular reference and was designed to—particularly to depict the area of specific cooperatives would be a better source of the information of the area of that customer than this rough approximation?

A. Well, if you were attempting to get a very precise geographical line, you would have to have a map of a much different scale than this one to know exactly where it was.

Q. Yes, sir. At the time this map was prepared, is it not true that the provisions of the House or the Congressional bill being considered by the Congress were quite different as to territorial limitations than were finally passed into law?

A. This had nothing to do with the description of territorial limitation in any of the Acts of bills. Mr. Rowntree: [fol. 440] I'd like to exhibit at this point pages 51 and 52 —let's see—50, 51, and 52 of the House Committee hearings, March 10, 1959, pertaining to the point that the last question pertained to.

(The documents referred to were marked for identification as Exhibit No. 1, and filed as exhibit to this deposition.)

By Mr. Rowntree:

Q. If you will look at those pages, Mr. Wessenauer, I think Mr. Jones there in that first quotation on page 50 shows the general provision then before the Congress, and that they were talking about counties, and over on page 51 in the first quoted—

A. Just a minute.

Q. —proviso, there's also limitation having to do with counties, and do you recall that at that time your answer on that same page, 51, was true down there in the—about three-fourths of the way down in the paragraph starting off "the second question," the second sentence of that paragraph states:

> "Apparently they hit on a plan which was to say they would allow it to go to the edge of a county which lies in the drainage basin in whole or in part, or a county in which power is already available in whole or in-[fol. 441] part."

Do you recall that that was the situation as far as the terms of the bill before Congress at that time was concerned?

A. I think—I wouldn't change what I've said here.

Q. Yes, sir. So at that time there would be no particular need to depict on a map the area of a private utility that extended into one of these counties, that would be covered by the exclusion—be covered by the language of the Act as being within the drainage district, or within the service area?

A. I don't understand your question.

Mr. Rowntree: Would you read the question?

(The last question was read by the reporter.)

A. The map is intended to show the area being served by the municipal and cooperative distributors of TVA power. The language of the bill, as I have indicated here, incorporated a larger area.

Q. Yes, sir. And the language of the bill had reference to county lines as a sort of geographical boundary line at that time?

A. The bill would have provided a county line as a geographical boundary line at that time, yes, sir.

[fol. 442] Q. And do you recall that Congress rejected the county line idea in the final bill that was passed?

A. It was a different language in the final bill, yes, sir.

Q. And had no reference to county lines?

A. Well, this had no reference to county lines either in that sense.

Q. Well, it had reference to counties?

A. Yes, sir.

Q. Which would encompass the whole county?

A. Yes, sir.

Q. And actually, TVA recognized that even though it served on July 1, 1957, the area of part of a county, that did not give it authority to extend its service into the rest of the county unless it fell within some of the other permissive extensions authorized by the Act?

A. Why whatever the Act, the language of the Act provided, we would have been able to serve more of the county that's possiblbe.

Q. I refer to Exhibit 3 filed to the deposition of Mr. C. Wilson House, and I read a portion of the second page under "Summary of information given to Chamber of Commerce members by TVA representatives:"

> "Due to present territorial limitations in the TVA Act, it is not now believed that TVA power could be [fol. 443] furnished to Cumberland Gap."

This being a memorandum of a meeting held August 15, 1961.

Are you advised whether or not Cumberland Gap is in Claiborne County, Tennessee?

A. No, I am not.

Q. Did you have any knowledge with respect to this meeting of Claiborne County representatives with TVA representatives on August 16, 1961?

A. May I see that memorandum, and I could tell better.

I may have known that there was a meeting, but I don't know that I knew the details of it.

Q. Are you acquainted with the provisions of the TVA Bond Act of 1959 with respect to territorial limitations?

A. Yes.

Q. Has TVA undertaken to fix a line on a map or other presentation which would cover—which would show the boundary of the TVA service under the terms of that Act of 1959?

A. No, we haven't fixed it precisely, because the language of the Act itself defines it, and each circumstance would have to be looked at.

Q. Well, whenever TVA comes up against the question of whether a particular service will be inside the five-mile [fol. 444] limitation, how does it determine whether the five miles have been exceeded or not?

A. You have to look at the particular circumstances of a given area.

Q. Do you draw a line at that time?

A. We would have to determine whether there was an infraction of the law or not at that time.

Q. Do you wait until some dispute has arisen before a line is undertaken to be drawn by TVA of its boundary.

A. Well, we haven't had a reason to draw a line, precise line.

Q. Does TVA correlate or coordinate with the distributors the question of where this line is to be drawn?

A. Our contracts with the distributors contain a provision which reminds them of the limitations of the law so that they are, under the contract, to observe the provisions of the TVA Act.

Q. Does TVA leave it up to each distributor to draw its own line?

A. We leave it up to the distributor to determine that they are staying within the law.

Q. Approximately how many distributors does TVA have at this time?

A. About 155.

Q. Most of those are municipalities?

[fol. 445] A. Well, about two-thirds of them are municipalities.

Q. About how many are cooperatives?

A. A little over fifty, I believe.

Q. Has TVA issued any publications to its distributors or to its employees as to how the line of boundary should be drawn?

A. No, sir.

Q. In case any question should arise?

A. No, sir.

Q. Now, Mr. Wessenauer, a question has arisen in this case with respect to Claiborne County, and I would like to ask you how you would draw a line across that county depicting where the boundary of TVA service should stop under the terms of the Act?

A. I don't know the answer to that.

Q. Has any officer or representative of TVA given you any advice about that?

A. About what?

Q. About the drawing of the line, where it—what factors would govern the drawing of the line?

A. Well, I think the factors that would govern that would be provided for in the Act.

Q. And where would you draw it then, this Claiborne County, specifically?

A. I don't know; I haven't looked at it.

[fol. 446] Q. Who would have the function in TVA of drawing that line?

A. Well, it would—if a line has to be drawn, it would be after an examination of all of the facts and I presume that we would get the advice of our Legal Department as to the meaning of the law with respect to any particular situation, and in light of that advice and the facts that we would have, we would ascertain where the line would be.

Q. Can you think of any other factor that would govern the drawing of the line other than the locations of the actual customers served July 1, 1957, by TVA power.

A. Well, that would be one factor, the meaning of the provisions of the Act would have to be taken into account.

Q. I'm talking about the basic line that would have to be drawn before you apply the other terms of the territorial limitations.

A. Well, location of customer served on July 1, 1957, would be one element.

Q. What would be another element?

A. Well, I'd think that it would be a question of whether they were inside a perimeter or whether they were surrounded by service would be a factor.

Mr. Rowntree: Read that answer.

(The last answer was read by the reporter.)

[fol. 447] By Mr. Rowntree:

Q. Now what do you mean by a perimeter?

A. Well, for example, there could be customers of cooperative which extended fairly extensively through a county area. There may be isolated customers served by others within that area. I would think that that line would be drawn on the outer limits.

Q. Are you talking about pockets or extensions of area that was not occupied into—

A. Well, I was talking about pockets, yes. And too, it would be the question of the five-mile provision of the Act.

Q. Yes, sir. That's after you have drawn the basic line, however, before you can apply the five-mile rule, is that right?

A. Well, I don't know whether the line is inside or outside the five miles.

Q. Well, you have to have a starting place to start the five miles, is that not right?

A. You have to start somewhere with five miles, that's right.

Q. Now, do you recall that the Act of Congress did have a provision in it about pockets and extensions of territory into the service area that was not occupied by TVA power at that particular time?

[fol. 448] A. I don't recall any reference to pockets in the Act.

Q. Do you recall this language of the Act:

> "Nothing in this subsection shall prevent the corporation or its distributors from supplying electric power to any customer within any area in which the corporation or its distributors have generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

Was not this designed to take care of any pocket situation?

A. I'm not sure what they had in mind in writing that, but I would think it would take care of pockets.

Q. I recall to you the language of Mr. Vincent in the House, page 14121 of the Congressional Record, July 23, 1959, quote:

> "However, the amendment does permit TVA or its distributors to supply electric power to customers within the area in which TVA or its distributors had generally established electric services on July 1, 1957, so long as no electric service was being supplied to such customers from another source on the effective date of this Act. This is not intended as an enlargement of the existing territory, but only to permit TVA and its dis-
> [fol. 449] tributors to supply power to small unserved islands or isolated areas within the general area already being served by TVA and its distributors."

Is it not true, Mr. Wessenauer, that this pocket provision was subject to the non-existence of the electric service from some other supplier in the language of the Act?

Mr. McCarthy: Now, I don't want to limit your examination here, Mr. Rowntree, but really I don't think any of this is appropriate. You are asking this witness to speculate as to what Congress meant, you are asking him to interpret the provision of the Act, and that seems to me to be something that the Court is going to have to do when we get the record before him.

Now I'm not going to instruct him not to answer if he—but I just do want to make the point that I think this is highly improper.

Mr. Rowntree: You say you are not instructing him not to answer?

Mr. McCarthy: No. No, not at this time.

By Mr. Rowntree:

Q. Do you remember what the question was?

A. No, sir.

Mr. Rowntree: Read the question back.

(The last question was read by the reporter.)

[fol. 450] Mr. McCarthy: Well, obviously he can't answer that question; it's a legal question that you are asking him.

By Mr. Rowntree:

Q. Can you answer it?

A. No, I can't.

Q. Now we are generally talking here, Mr. Wessenauer, about the basic factors that would govern the drawing of a line in this very practical situation in Claiborne County.

Are there any other factors that you would have in mind in drawing that line?

A. I don't recall of any now.

Q. All right, sir. Mr. Wessenauer, you have testified that TVA has not attempted to fix an overall area limitation for the time of July 1, 1957, as provided in the Act of Congress. How do you expect to take care of the situation when a question arises sometime in the future since '57 is already a long time away?

A. I think we can make use of the records of service which the distributors have, and we have a general knowledge of the situation. Many of these areas, you know, there's no problem at all.

Q. But some of them get pretty close to being problems, I suppose, don't they?

[fol. 451] A. Not as far as I'm concerned.

Q. Well, do you consider Claiborne County a problem?

A. (No answer.)

Q. I have tried to get from you the factors that would govern the drawing of the line at this time. Can you really draw a line in Claiborne County from—

A. Well, the question in Claiborne County is whether or not TVA can serve Tazewell and New Tazewell. I have been advised by counsel that we can; it's no problem to me.

Q. That's the end of it as far as you are concerned, when you get the advice of counsel?

A. That's right.

Mr. Rowntree: That's all.

Cross-examination.

By Mr. McCarthy:

Q. Mr. Wessenauer, if you will refer to that blue and what color do you call that?

A. Just call it pink.

Q. Pink. I believe you testified that the blue shows the drainage area and the pink shows the area served by TVA distributors. Does the area served by TVA distributors overlap part of the blue?

A. Yes, it does. The extent of its overlapping is indicated [fol. 452] by a pink line on the map.

Q. Now was that map prepared under your supervision in the sense that you directed that it be prepared?

A. It was prepared for use in connection with the hearing and under my general supervision.

Q. And at your direction.

You also testified that TVA has not undertaken to define precisely the area which can be served under the 1957 amendment. Has any attempt been made to define the approximate outside perimeters?

A. Yes.

Q. When was that done?

A. Several months ago, I believe.

Q. Was a map prepared showing the approximate outline of this area?

A. Yes.

Mr. McCarthy: That's all.

Redirect examination.

By Mr. Rowntree:

Q. Was that map prepared in connection with this case?

A. No, sir.

Q. That was an approximation map, you say?

A. Yes, outside perimeter.

Q. Was the map prepared after this case which was filed [fol. 453] November 7, 1963?

A. It's possible it was. I just don't recall the date of it.

Mr. Rowntree: That's all.

Further Deponent Saith Not.

Gabriel O. Wessenauer, By: Georgella Mankin.

Sworn to before me this the 12th day of August, 1964.
Georgella Mankin, Notary Public at Large, State of Tennessee.

My commission expires July 2, 1966. (Notary Seal.)

[fol. 454] Notice of Taking Depositions and Certificates of service.

[fol. 455] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY,

v.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, Individually and as Mayor of Tazewell, Tennessee, JAMES B. DEBUSK, Individually and as Mayor of New Tazewell, Tennessee

MEMORANDUM OPINION—October 15, 1964

Plaintiff, Kentucky Utilities Company, hereafter referred to as KU, seeks injunctive relief against defendants, Tennessee Valley Authority, hereafter referred to as TVA, Powell Valley Electric Cooperative, hereafter referred to as Powell Valley, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, to prevent them from taking or attempting to take its electric customers in the area of Tazewell and New Tazewell, Claiborne County, Tennessee, and also a judgment for damages for loss of business resulting from defendants' alleged wrongful acts.

Jurisdiction is based on 28 U.S.C. Sections 1331, 1332, 2201 and 2202.

[fol. 456] The action against Mayors Hardin and DeBusk in their individual capacity was withdrawn during the trial.

KU seeks to enjoin TVA from selling or delivering electric power to Powell Valley, a distributor of TVA power, and enjoin Powell Valley from purchasing or receiving from TVA electric power for resale in either of the municipalities of Tazewell, Tennessee or New Tazewell, Tennessee, other than to customers and locations receiving electric service from Powell Valley on October 30, 1963. Relief is also sought against the Mayors of the two towns in their

official capacities to prevent them from interfering with KU customer contracts.

Plaintiff contends that commencing in 1961 or 1962 and continuing to the present time, all of the defendants have combined and conspired and acted together to appropriate to themselves all of the electric utility customers, business, revenues and contracts of KU for electric service within the two Tazewells, and that several dozen customers have been lost by KU as a result of the conspiracy.

The claimed overt acts consist of numerous meetings held by the representatives of defendants whereby plans were devised and carried out through acts commencing October 30, 1963 to take all of the business of KU in the two municipalities.

Plaintiff further contends that the TVA in furnishing electric power and in agreeing to furnish electric power to Powell Valley, which sells to the two municipalities and [fol. 457] which has agreed to sell at retail to customers located in the corporate limits of the municipalities, violated 16 U.S.C. Section 831n-4 (hereafter called the 1959 TVA Act), which provides in pertinent part as follows:

> ". . . Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality

receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

The Act became effective August 6, 1959. It is to be noted that thereunder the TVA, except for specified exceptions, was not to contract for the supply of power "outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

KU insists that TVA was not the primary source of power supply in the areas of the two municipalities on [fol. 458] July 1, 1957 within the meaning of the Act but that the municipalities were receiving electric service from KU on that date and on the date the Act became effective.

KU further contends that there was a common law conspiracy of the defendants to interfere with the contractual relations between it and its customers in the two municipalities by inducing such customers to terminate their contracts with KU in violation of the 1959 TVA Act.

TVA contends that plaintiff has no standing to maintain the action as the complaint presents no justiciable controversy. That KU does not have an exclusive franchise to furnish electric service in the municipalities and has no common law or statutory right to be free from competition of TVA and its distributors. That the 1959 TVA Act does not expressly confer upon KU the right to maintain an action based upon alleged violations of the Act by TVA and, in the absence of such provision KU is without standing to bring the action.

TVA contends further that the findings of its Board that the two municipalities are within the TVA service area is not subject to judicial review if the finding was made in

good faith and supported by substantial evidence and that the Board's action met these requirements.

TVA also contends that it has made no contract since the effective date of the Act which would have the effect of changing the relationship of TVA or its distributors with respect to the source of power supply in the two municipalities.

[fol. 459] TVA says that it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957 within the meaning of the 1959 TVA Act.

TVA denies that it unlawfully induced or combined to induce customers of KU to terminate, breach or sever alleged contracts with KU for electric service.

TVA asserts that the citizens of Tazewell and New Tazewell, Tennessee have a right to obtain electric service from whomever they please and that KU has no right to be free from lawful competition.

The two Mayors, and the municipalities which they represent, adopted the contentions made by TVA and in addition they point out that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities. They assert that the municipalities have the right under the Tennessee law to establish their own electric systems and that the citizens acting through their elected officers have the right to choose between the TVA current and the current furnished by private institutions.

The defenses of Powell Valley to the complaint are the same as the other defendants insofar as applicable.

Standing of Plaintiff to Maintain Action

If plaintiff has proved the charges of common law conspiracy and a violation of the 1959 TVA Act and has sus-
[fol. 460] tained injuries therefrom, it has standing to maintain the suit. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537, cert. denied, 358 U. S. 830 (C. A. 6); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, (D.C. Cir.) 323 F. 2d 290, cert. granted, 376 U. S. 948; *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, affirmed 278 F. 2d 871 (D.D.C.).

The cases cited by TVA of *Alabama Power Company* v. *Ickes,* 302 U. S. 464, *Tennessee Electric Power Company* v. *Tennessee Valley Authority,* 306 U. S. 118 and *Kansas City Power & Light Company* v. *McKay,* 225 F. 2d 924 are distinguishable from the case under consideration. Each of these cases involved a suit by a private utility to enjoin officers or agencies of the United States from making contracts which would have the effect of increasing competition between the private retailer and the public power agencies. The public power agencies' competition was legal in itself, but was attacked on the basis that either the statutes authorizing the activities of the various officers and agencies were unconstitutional or that the officers and agencies had exceeded their authority under the Act. In each case, it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise; hence, no common law or statutory rights of the plaintiffs had been invaded. The plaintiffs, therefore, had no standing to question the authority of the various officers and agencies of the United States.

In *Alabama Power Company* v. *Ickes,* supra, the Court likened the position of the plaintiffs to that of a taxpayer [fol. 461] suing to enjoin the expenditures of federal funds, which could not be done under the decision of *Massachusetts* v. *Mellon,* 262 U. S. 447. The distinction in these cases is that the competition was shown to be legal while in the case under consideration it is claimed that the competition is illegal by reason of the unlawful conspiracy and the alleged violation of the 1959 TVA Act. See: *Texas & P. R. Co.* v. *Rigsby,* 241 U. S. 33, 39-40; *Wheeldin* v. *Wheeler,* 373 U. S. 647; *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195, cert. denied, 365 U. S. 814; and *Dann* v. *Studebaker-Packard Corporation,* (C. A. 6) 288 F. 2d 201.

Findings of the TVA Board Subject to Judicial Review

The TVA Board on August 26, 1964, some three weeks before the trial, found and determined that all of Claiborne County, Tennessee (within which County the two municipalities are located) is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The TVA was first contacted by the Claiborne County Chamber of Commerce in 1961 for power. One or more members of the TVA legal staff was present at this meeting. The representatives were advised by TVA that there was a legal question as to whether TVA power could be supplied in the municipalities under the 1959 TVA Act and that a court decision would be helpful in resolving the question. Mr. Wessenauer testified in a discovery deposition that the TVA lawyers had advised him that under the Act TVA power could be supplied in Tazewell and New Tazewell and that so far as he was concerned that was the end of it. He also testified that the TVA left it up to the distributors to determine that they were staying within [fol. 462] the boundaries set by the 1959 Act and that he thought this was a factor that should be taken into consideration by the TVA Board in determining the TVA area. He stated that if he were fixing the lines he would wipe out the pockets inside the TVA service area. That he had not been advised as to the provisions of the Act with respect to "islands."

The factual presentation of Mr. Wessenauer, supplemented by the opinion of Mr. McCarthy, Chief Counsel, and its independent study, caused the Board to conclude that the two towns were within the TVA service area on July 1, 1957.

The issue before the Board was one of fact and law. Proper interpretation of the 1959 Act was the law issue, and the determination of the area supplied by TVA and the area supplied by other sources was the issue of fact.

It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U. S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank,* supra; *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U. S. 316.

The case of *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, cited by the defendants involved the Walsh-Healy Act which expressly provided for hearings to be held by the Secretary of Labor at which evidence would be introduced and on the basis of that evidence a wage determination would be made. The question of the size of "localities" was necessarily one of the subjects upon which the Secretary [fol. 463] was required to act in each case and make a

determination. The decision by the Secretary was a decision of Congress made by delegated authority.

Another case cited, *Re U. S. ex rel TVA* v. *Welch*, 327 U. S. 546, 554, is distinguishable from the present case in that the discretionary power to determine what lands should be condemned is expressly provided by the TVA Act. Title 16 U.S.C. 831x.

United States v. *Carmack*, 329 U. S. 230, 242-243, involved the selection of sites to be condemned for post offices. The Court noted that within its legislative power, Congress had the right to choose or reject the proposed post office site by direct action.

Conspiracy Charge

In support of its charge of conspiracy, KU contends that when the question of TVA power for the two municipalities was considered in 1961, TVA doubted that its power could be distributed in the municipalities without violating the 1959 Act and that a court decision should be obtained to clarify the issue. It was made clear by representatives of TVA and Powell Valley at this meeting that Tazewell and New Tazewell could not feasibly establish an electric system of their own but would have to depend on Powell Valley.

After the initial consideration of this question, KU contends that TVA officials cooperated in a move by the Chamber of Commerce and the two municipalities to buy TVA power for Tazewell and New without getting a court con- [fol. 464] struction of the Act. From that point on, various problems, in addition to the territorial limitations contained in the 1959 Act, were encountered.

KU asserts that it was known that KU would not voluntarily sell its facilities in the area of the municipalities and that the defendants planned to use various forms of threats and duress upon KU to force the sale of its facilities. That it was planned to use the Tennessee Public Service Commission as a lever to force the reduction of KU's rates in the area and to use threats to duplicate the KU system by a parallel system.

It further contended that Powell Valley was known to be the only feasible agency to supply TVA power in the

two Tazewells from an economic standpoint but was blocked from doing this for several reasons: First, there was an agreement between Powell Valley and KU as to the boundaries to be served by these utilities. The 1959 Act encouraged such agreements. After several meetings of the defendants in 1961 and 1962, Powell Valley gave notice of termination of the 1958 agreement between it and KU to be effective in 1963. The 1952 agreement between KU and Powell Valley which prevented the taking of each other's customers could not be terminated according to its terms without terminating the whole tri-party agreement under which KU supplied power into the Tazewell and New Tazewell area for its own customers and also for use by Powell Valley. This was an advantageous arrangement to Powell Valley and termination was not desired.

KU asserted that REA had a policy against duplicating facilities and the use of funds of the cooperative borrower [fol. 465] for the construction of duplicating facilities.

That Powell Valley feared that if KU was pushed out of the Tazewell and New Tazewell area, KU itself might terminate the 1952 tri-party agreement under which KU supplied power to TVA for use by Powell Valley. If this should happen, Powell Valley customers in the area would be left without a source of TVA power. TVA put to rest this fear when the TVA Board promised that some source of power would be supplied if the parties moved along with the plan and supplanted KU in the area.

That because of many problems, a decision was made by defendants to use a so-called municipal system initially to displace KU in Tazewell and New Tazewell and the surrounding area. It was recognized that a municipal system was not feasible but that it might be utilized as an initial arrangement to displace KU, after which Powell Valley would take over. Powell Valley service lines were to be used in getting its service to this small initial municipal system. While the two cities were carrying on the so-called municipal system, Powell Valley would actually do the operating, meter reading, and servicing.

It was KU's contention that TVA and Powell Valley suggested that the Mayors of the two cities present resolutions under which the Board of Aldermen of the cities simply turned the whole matter of establishing and operating

this system or systems over to the Mayors to handle as the course of expediency dictated.

That in October, 1963, Powell Valley's contractor and engineer, acting under ostensible contracts with the Mayors, moved in and started disconnecting KU's customers who were induced by the foregoing arrangement to [fol. 466] switch, and connected them to Powell Valley's lines. The municipal system that was thus constructed consisted largely of drop service lines to individual customers, which lines were connected to the nearest lines of Powell Valley. In several instances, one or more poles and a transformer were required to connect the customer to Powell Valley lines. After twenty-four customers of KU were appropriated, this action was instituted and the further taking of customers ceased. The contractor discontinued his work for the municipalities.

In the Court's opinion the evidence fails to show a conspiracy upon the part of any of the defendants. The evidence shows that the retail rates for electricity to residential and commercial customers in effect for KU prior to the institution of this suit were substantially higher than those for the TVA power distributors, and under applicable rate schedules the disparity increased with increased use. As a consequence, some of the witnesses testified that within the two towns the value of properties served by TVA electricity was substantially and uniformly higher than similar properties served by KU. The rate disparity created discontentment among some of the residential and industrial consumers and a number of citizens of the two towns appealed to their civic leaders and to their elected officials to explore the possibility of lower cost electricity. Numerous meetings were held among representatives of the municipalities, Powell Valley, TVA and various civic groups to see what could be done towards getting TVA power beginning in 1960. At these meetings, TVA representatives advised that TVA could not enter into a power contract with either of the municipalities because they were so small that it would not be economically feasible for them [fol. 467] to build and maintain their own separate distribution system and undertake the responsibilities of a TVA distributor. The representatives of the towns were advised to discuss their problems with Powell Valley to see if suit-

able arrangements could be made to obtain their electricity from Powell Valley.

Powell Valley advised the municipalities that it would be unable to obtain REA financing for construction of duplicating distribution lines within the towns and, therefore, the towns would have to buy or build their own systems.

At a meeting with the TVA Board of Directors, the Board advised representatives of Middlesboro, Kentucky and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. This advice was confirmed at a meeting on November 27, 1962, at which time TVA gave representatives of the towns and Powell Valley assurance that the two towns were within the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA would continue to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area.

The municipalities then sought technical assistance and advice from the Legal Consultant on Municipal Law at the University of Tennessee as to how they go about financing their own municipal electric systems. They employed an attorney who specialized in this field to advise and consult with them. After considering the advice and suggestions given them, the two towns, through their authorized officials, circulated a petition to the citizens of the towns to [fol. 468] determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the towns of their own municipal electric systems. Following the circulation of these petitions, the town councils passed resolutions on October 21, 1963 authorizing the Mayors of the two towns to take the necessary steps to purchase or build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing

of the customers in the name of the two towns. Powell Valley was to sell electricity to the two towns at wholesale rates plus a small charge for transmitting the electricity, and it was also agreed that the rates charged the city customers would be no higher than those charged by Powell Valley to its customers under its contract with TVA.

Beginning in October, 1963, a number of residents of the two towns who were then receiving service from KU made application to the towns for electric service and notified KU to discontinue service to them and to disconnect their meters. On October 31, 1963, until the filing of this suit on November 7, 1963, eighteen former customers of KU had terminated their service with KU and became customers of the two towns.

[fol. 469] The towns of Tazewell and New Tazewell have a legal right to own and maintain their own municipal electric systems and have a right to compete with KU for the customers in those towns and the offering to serve those customers at lower rates than those charged by KU did not constitute an unlawful interference with the customer contracts of KU in the absence of fraud. The evidence fails to show any fraud upon the part of any of the defendants. 86 C.J.S. *Torts*, § 44c, (1954); Annot., 84 A.L.R. 63 (1933); Annot., 26 A.L.R. 2d 1259 (1952); *Fairbanks, Morse & Co.* v. *Texas Electric Service Co.*, 63 F. 2d 702 (C. A. 5, 1933); *Citizens' Light, H. & P. Co.* v. *Montgomery Light & W. P. Co.*, 171 Fed. 553 (M.D. Ala. 1909); *Wolf* v. *Perry*, 339 P. 2d 679 (N.M. 1959); *Emery* v. *A. & B. Commercial Finishing Co.*, 315 P. 2d 950 (Okla. 1957); *Augustine* v. *Trucco*, 268 P. 2d 780 (Cal. App. 1954).

The consumers in Tazewell and New Tazewell who have discontinued their service with KU had a legal right to discontinue such service and to take service from the municipalities. *Cass County Electric Coop.* v. *Otter Tail Power Co.*, 93 N. W. 2d 47 (N.D. 1958); *Blue Ridge Elec. Membership Corp.* v. *Duke Power Co.*, 128 S. E. 2d 405 (N.C. 1962).

Was TVA the Primary Source of Electric Power in Tazewell and New Tazewell on July 1, 1957?

KU contends that the area for which TVA or its distributors were the primary source of power supply on July [fol. 470] 1, 1957 is the actual geographical area where the

distribution facilities and customers of TVA and its distributors were located on that date; that if other utilities were the actual source of power, such areas were excluded from the TVA areas although they may have been wholly or partially surrounded by areas for which TVA or its distributors were the actual source.

KU argues that if a perimeter is to be drawn defining primary service area, the location of such perimeter can be properly fixed only by such facts as the facilities, customers and the rendering of service. Where adjacent service areas of private utilities form peninsulas or corridors or other indentations into the service area of TVA, such perimeter must follow these factual service areas and thereby exclude such peninsulas or corridors from the primary service area of TVA.

KU insists that all of the maps filed in evidence show that TVA or its distributors were not the primary source of power in these municipalities on July 1, 1957, and that a dozen TVA maps in evidence draw the continuous perimeter of TVA's primary service area so as to dip down into Claiborne County south of Tazewell and exclude, from TVA's area, KU's service area extending down from KU's adjoining service area in Kentucky. Thus, it argues, TVA's primary service area does not include, and cannot lawfully be described so as to include these peninsulas of estab-
[fol. 471] lished service of adjacent private utilities.

KU has insisted that on July 1, 1957 there were in excess of 70 municipalities served by private power companies, which were entirely surrounded by TVA service and that these islands or pockets of private power service were referred to in the legislative history of the 1959 Act. KU contends that it is inconceivable that anyone could conclude that TVA was the primary source of power supply within these municipalities on July 1, 1957 or that these municipalities could be considered in the area for which TVA was the primary source of power supply on such date.

TVA asserts that these 70 municipalities which plaintiff refers to as being within the primary area are mostly small unincorporated communities which are not municipalities at all. 62 C.J.S. *Municipal Corporations*, § 1d (1949).

KU points out that the fact that TVA's distributor, Powell Valley, on July 1, 1957 supplied 16 customers in

KU's defined service corridor in Claiborne County outside of Tazewell and New Tazewell, and 28 customers within the towns, does not affect the conclusion that KU was the primary source of power supply in the defined corridor including the two towns. That Congress recognized that there might be areas where TVA distributors supplied some customers but were not the primary source of power supply. Such areas, it argues, including the KU corridor and the two towns, therefore, are not part of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

[fol. 472] Both TVA and KU recognized that the territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Committees of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the primary area where TVA or its distributors had generally established electric service on July 1, 1957.

The statute provides in part:

> ". . . the Corporation shall make no contracts . . . making the Corporation or its distributors . . . a source of power supply outside the area for which the Corporation or its distributors were the *primary source of power* supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area . . ." (Emphasis added.)

and that

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had *generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.*" (Emphasis added.)

The Court had grave doubt during the trial as to whether the last quoted paragraph referred to the primary area, but is now convinced that it refers to the area in which TVA had established electric service outside of the 80,000 square mile primary area and the additional five mile strip. [fol. 473] The words "Nothing in this subsection shall prevent" appears to be an additional grant of power to serve an area not covered by the preceding paragraph relating to the primary area and the five mile strip, rather than a limitation on the power to serve the primary area.

If the statutory language is clear, it may be given effect in accordance with its provisions without resort to legislative history. *Caminetti* v. *United States,* 242 U. S. 470, 485; *Osaka Shosen Line* v. *United States,* 300 U. S. 98, *U.S.* v. [fol. 474] *Oregon,* 366 U. S. 643, 648. But the legislative history supports what we believe to be a logical reading of the language of the Act.

We are told in the briefs that the Senate passed a bill in 1957 which would have permitted TVA to serve the whole of any county lying partly within TVA's existing service area or the Tennessee watershed, which would have permitted an increase in the area served by TVA from 80,000 to 105,000 square miles. That the bill passed by the House in 1959 would have limited TVA to its existing service area. That the task before the Senate in 1959 was to work out a compromise between these two proposals.

The report of the Senate Committee rejected the term "service area" because it was "nebulous" and because some of the members felt that it would prevent TVA distributors from serving "small areas served by private power entirely surrounded by the lines of TVA distributors" and "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."[1]

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[1] "Under the original TVA Act, Congress provided that the area in which TVA power should be made available would be determined, first by the desire of the people, and second by the economic and engineering feasibility of providing service. The term "service area" is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers. Although there

[fol. 475] Senator Randolph expressed the view that TVA should be encouraged to serve any islands that existed within its geographical operating area as it existed on July 1, 1957.[2]

Senator Randolph and Senator Talmadge sponsored the territorial amendment which was adopted on the Senate floor. If Senator Randolph believed that TVA should be encouraged to serve islands of private power company service within its operating area, it is not likely that he would have sponsored an amendment whose language pre-

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has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. Others believed, however, that the stabilization area should be defined and limited by law.

* * * * * * *

. . . The area where each distributor sells power is determined by community growth and the relationship between neighboring distributors. Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds of TVA." [From Report of Senate Committee, H. R. 3460, Report No. 470, pp. 8, 9].

[2] "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." [Supplemental views of Mr. Jennings Randolph on H. R. 3460, p. 56].

vented TVA from rendering service within the primary area.

Senator Cooper objected to the provisions of the Randolph-Talmadge amendment prohibiting service in a municipality outside its primary area of service as he felt that small municipalities near the periphery should be allowed to obtain TVA power. He apparently had no question about its authority under the amendment to serve municipalities [fol. 476] inside the periphery.[3]

Representative Davis, the House floor manager for the bill, when explaining the effect of the Senate version stated that the Senate bill drew a line around the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.[4]

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[3] "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility. [105 Cong. Rec. 13052].

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I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.

Nevertheless, if my motion to strike shall be defeated, I will vote on final passage for the bill, because I have sponsored self-financing from the outside. I respect the service of private utilities in my own State. I have stood for the right of the people in small communities and cooperatives near the TVA area to have some voice in their choice of power supply." [105 Cong. Rec. 13053].

[4] "As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area." [105 Cong. Rec. 14114 (1959)].

Statements of sponsors of the bill rather than opponents are usually looked to for legislative history. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 395; *Duplex Co.* v. *Deering*, 254 U. S. 443, 474-75.

Representative Vinson, an opponent of the bill, felt that the territorial limitations in the Senate bill were more [fol. 477] generous to TVA than that of the House bill, but he felt that the limitations in the Senate bill could be justified.[5] He recognized that TVA would have full authority to supply the full power requirements of the primary area.

Representative Scherer, an opponent of the bill, understood that TVA could serve areas already receiving power from another source.[6]

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[5] "While the territorial limitation by the Senate is more generous to TVA than that of the House, I believe it can be justified. I think, therefore, it is safe to say that this amendment proposed and adopted by the other body, if adopted by the House and enacted into law, will provide a fair and reasonable limitation under which TVA will be allowed to increase its power generating capacity to meet the increased requirements within the area delineated by the amendment, and at the same time give reasonable protection to the privately owned systems, and their investors, and to the municipalities and other governmental organizations dependent upon the privately owned systems as an indispensable source of tax revenue." [105 Cong. Rec. 14122 (1959)]

[6] "However, the total area of such 5-mile extension beyond the present periphery greatly exceeds the 2½ percent or 2,000 square mile limitation provided by the Senate bill. Therefore, TVA during the next few years can pick and choose as it sees fit in this 5-mile extended area such spots as it desires until the 2½ percent or 2,000 square miles have been reached.

One can readily see that in some places the present periphery will not be extended at all. In other places it may be extended 1 mile beyond the present periphery; in other places, 2 miles or 3 or 4 miles. TVA will pick and choose the best and most lucrative spots in this 5-mile area whenever it gets around to it. In the meantime, private power

The maps filed as exhibits in this record, Exhibits 94, 95 and 96, and used by TVA witnesses before the Congressional Committee, show that Claiborne County was within TVA's primary service area. One of the maps was presented by KU (Ex. 92) which showed all of Claiborne County in the primary area except a small mountainous part. However, KU filed another map, Exhibit 100, which shows that the Tazewells were served by KU. This map also shows facilities of KU, including transmission lines that run from Bell County, Kentucky, southeast through the two Tazewells. KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show [fol. 478] that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.

As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Val-

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companies certainly will hesitate to extend their service to anyone within the 5-mile area because there will be no assurance that TVA might not the next day decide to take over that particular area." [105 Cong. Rec. 14125 (1959)]

ley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service.

[fol. 479] During the month of June, 1957, in Tazewell, KU supplied 118,737 KWH of electricity while Powell Valley supplied 11,368 KWH, and in New Tazewell KU supplied 116,645 KWH compared to 3,024 KWH supplied by Powell Valley. Considering the two towns together, KU supplied a total of 235,382 KWH to Powell Valley's 14,392 KWH. KU thus supplied 94.2% of the KWH of electricity consumed in these two towns during June, 1957. During the month of July, 1957, in Tazewell KU supplied 106,647 KWH to Powell Valley's 11,410, and in New Tazewell KU supplied 121,440 KWH to Powell Valley's 3,356. In the two towns, KU thus supplied 228,087 KWH during this month to Powell Valley's 14,766 KWH. In July 1957 KU thus supplied 93.9% of the electric energy consumed in the two towns.

On August 6, 1959, the day the Act became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31.

As of July 1, 1957, KU supplied electric energy to 1,278 customers outside of the municipalities. In 1963, a 34.5 KV transmission line of KU was rebuilt to a 69 KV which is now owned, maintained and operated by KU within this corridor of KU's service area.

On October 30, 1963, the customers of TVA suppliers had increased to over 100 in the municipalities.

[fol. 480] The town of Tazewell was incorporated on November 17, 1954 and the town of New Tazewell was incorporated on November 19, 1954. KU and its predecessors had been serving the incorporated areas at least as early as 1920.

In 1952, prior to the enactment of the TVA Act of 1959, KU, TVA and Powell Valley entered into an agreement with respect to means of supplying the loads of KU and Powell Valley. Powell Valley had been serving Claiborne County since 1940. KU and Powell Valley by letter agreement on January 8, 1958, agreed that neither party would

serve any customer at any given location, which location was taking service from the other party; that any new load would be served by the party whose facilities were closest to the load and that the parties would consult with each other in an honest effort to resolve any differences on an equitable basis. The letter agreement provided it should remain in effect for a period of five years and should continue from year to year subject to the right of either party to terminate at the end of any annual extension.

Maps were prepared defining the respective areas. For a number of years, the maps were used to resolve questions which arose as to service to particular customers. This agreement was terminated by Powell Valley some time in 1962 or 1963.

The TVA Board of Directors on August 26, 1964 made an official and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New [fol. 481] Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.

The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

The finding of the Board was made in good faith and supported by substantial evidence.

The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson,* 127 F. Supp. 400.

None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its con-

tract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint.

Robert Taylor, United States District Judge.

[fol. 482] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY, Plaintiff,

v.

TENNESSEE VALLEY AUTHORITY; POWELL VALLEY ELECTRIC COOPERATIVE; EDWARD J. HARDIN, individually and as Mayor of Tazewell, Tennessee. JAMES B. DEBUSK, individually and as Mayor of New Tazewell, Tennessee, Defendants.

Transcript of Evidence and Proceedings—
September 21-24, 1964

[fol. 483] Exhibits

Number	Description
1	Minutes of Quarterly Court
2	Order
3	Minutes of Quarterly Court
4	Order
5	Instrument of Conveyance, Bill of Sale
6	Letter, McNiel to Brown, 8-22-52
7	Letter Agreement, KU and PVEC, 1-8-58
8	Letter, McNiel to KU, 1-23-58
9	Letter, PVEC to KU, 10-16-62
10	Letter from Mayors, 9-26-63
11	Letter, Fairman to Mayor Hardin, 10-29-63
12	Letter, Fairman to Mayor DeBusk, 10-29-63
13	Telegram from Mayors
14	Map

[fol. 484]

15–18	Maps
19	List of Number of customers
20	Kilowatt hours in June & July, 1957
21	Number of customers, July 1, 1957
22	Kilowatt hours
23	Map of KU facilities
24	Map of location of buildings, 4-24-64
25	Map
26	Map
27	Map from TVA 1956 report
28	Map from TVA 1957 report
29	Map from TVA 1958 report
30	Map from TVA 1959 report
31	Map from TVA 1960 report
32	Map from TVA 1961 report
33	Map from TVA 1962 report

Number	Description
34	Map from TVA 1963 report
35	Map S-2
36	Map and letter, 6-18-52
37	Map
38	Map
39	Towns surrounded by TVA service
40	Map
41	Letter to Tazewell
42	Letter to New Tazewell

[fol. 485]

43	Letter to Mayor DeBusk, 6-26-63
44	Letter of June 27, 1963
45	List of customers
46	Service contract with Brooks Wood
47	Service contract with K. Western
48	Service contract with D. Shockley
49–56	Photographs of service connections

[fol. 486] APPEARANCES:

For the Plaintiff: John A. Rowntree, Esq., Fowler, Rowntree & Fowler, Knoxville, Tennessee. Malcolm Y. Marshall, Esq., James S. Welch, Esq., James D. Estep, Jr., Esq., Ogden, Robertson & Marshall, Louisville, Kentucky.

For the Defendant Tennessee Valley Authority: Charles J. McCarthy, Esq., Thomas A. Pedersen, Esq., Tennessee Valley Authority, Knoxville, Tennessee.

For the Defendant Powell Valley Electric Cooperative: Clyde W. Cridlin, Esq., Jonesville, Virginia,

For the Defendant Tazewell, Tennessee: William R. Stanifer, Esq., Tazewell, Tennessee.

For the Defendant New Tazewell, Tennessee: Phillip P. Ardery, Esq., Louisville, Kentucky.

[fol. 487] First Day of Trial

Monday, September 21, 1964

(At 9:07 a.m., court convened pursuant to adjournment, when the following proceedings were had.)

The Court: Call the case.

The Clerk: Call the case.

The Clerk: No. 4861, Kentucky Utilities Company v. Tennessee Valley Authority, et al.

The Court: The parties are ready, I assume?

Mr. Marshall: Yes, your Honor.

Mr. McCarthy: Yes.

The Court: Swear the witnesses, Mr. Clerk.

(Witnesses were sworn.)

The Court: Is the rule requested by either side?

Mr. Marshall: No.

Mr. McCarthy: We don't.

The Court: All right.

Mr. Ardery: I think we have one witness or two for the defendants who will be in a day late and may be sworn at a later time, if it is all right.

The Court: That is all right.

Call your first witness.

Mr. Marshall: If the Court please, we have so recently

pre-tried and discussed the case that we won't make any preliminary statement.

[fol. 488] I think it might expedite it if we could clear up one point as a matter of evidence.

It is apparent from the brief and arguments that it is Kentucky Utilities Company's position throughout the case that the significant facts relate to the service in Tazewell and New Tazewell and the issues relate to the areas in Tazewell and New Tazewell.

It is the defendants' position that service in areas of Claiborne County outside of Tazewell and New Tazewell are material facts.

I don't think that it would be possible for the Court to decide on objections as we proceed what the determining standards are going to be. I think that is going to be something you will have to decide after you hear all the evidence.

For Kentucky Utilities we would want to object to each time they offer evidence with respect to matters outside of Claiborne County on the ground that those matters are not relevant. I think if we object each time they do that it would be burdensome, and I would like if we might to object now and have a continuing objection for Kentucky Utilities to evidence to matters outside of Claiborne County.

The Court: You may.

[fol. 489] Mr. Marshall: On the ground that those matters are not relevant.

At the same time, since they will be introducing matters outside Tazewell and New Tazewell in other areas of Claiborne County—if I said, outside of Claiborne County, correct that. At the same time since those facts and matters of evidence will be introduced by the TVA and since no ruling will be made until after the trial on the standards, we would like to put in some facts to complete the picture without being held to have waived our position that the service in Claiborne County outside of Tazewell and New Tazewell is not material, if that is agreeable.

The Court: That is agreeable.

Mr. Marshall: With that statement we will call Mr. William Duncan to the stand.

WILLIAM A. DUNCAN, called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Marshall:

Q. Please state your name?
A. I am W. A. Duncan.
Q. What is your position with Kentucky Utilities Com-
[fol. 490] pany?
A. I am president and chief executive officer.
Q. Where is Kentucky Utilities Company's principal office and place of business?
A. Lexington, Kentucky.
Q. Since what date have you been president?
A. March 24, 1964.
Q. What position did you occupy with the company prior to becoming president?
A. I was vice-president in charge of operations.
Q. How long have you been with KU?
A. Since I graduated from the University of Kentucky in 1935.
Q. What degree did you receive from the University of Kentucky in 1935?
A. Bachelor of Science in mechanical engineering.
Q. In what state is Kentucky Utilities incorporated?
A. Kentucky.
Q. Is it qualified to do business in Tennessee and if so on what date did it become qualified?
A. It qualified to do business in Tennessee November 14, 1919, and since that date and now is so qualified.
Q. Does Kentucky Utilities generate electricity as well as distribute and sell it?
[fol. 491] A. Yes, sir.
Q. What generating plants are there in the system?
A. We have six generating stations with a capacity of 7,500,000 kilowatts.
Q. Does KU do business of serving any electrical customers in any state other than Kentucky and Tennessee?

A. No. A wholly owned subsidiary of the company, The Old Dominion Power Company supplies consumers in Virginia.

Q. Does Kentucky Utilities in its own name do business in Kentucky and Tennessee?

A. Yes.

Q. The precise details as to Kentucky Utilities electric service in Tennessee will be developed by other witnesses. At the present time will you state in just general terms that part of Tennessee in which Kentucky Utilities renders electric service?

A. In the Bryson Mountain area of Claiborne County, as well as an area that might be for convenience referred to as a corridor extending from the Kentucky-Tennessee line in the vicinity of Cumberland Gap down through Arthur, Harrogate, Tazewell and New Tazewell into an area beyond New Tazewell.

Q. About how many customers in Tennessee does Kentucky Utilities now serve?

A. About two thousand.

[fol. 492] Q. This litigation relates to Kentucky Utilities' service, business and revenues from such service in the incorporated municipalities of Tazewell and New Tazewell. What are Kentucky Utilities annual revenue from customers in those two municipalities?

A. In those two municipalities our annual revenues are approximately $178,000.00.

Q. Again just generally for the moment, what electric facilities does KU own in Tennessee for the rendering of service to these customers in Tennessee?

A. We own a 69,000-volt transmission line extending from the Kentucky-Tennessee state line south of Middlesboro in the vicinity of Cumberland Gap to Tazewell; two sub-stations—rather, one sub-station and the distribution lines, service meter, etc cetera, involved in supplying our customers in that area.

In addition, we own a 34.5 KV transmission line about two and a half miles in the Bryson Mountain area together with a sub-station, distribution facilities serving about 50 customers.

Q. That 69,000 volt transmission line that runs from Cumberland Gap on down to the sub-station in Tazewell,

does that same line extend on northward into Kentucky Utilities' contiguous service area in Bell County, Kentucky.

A. Yes.

[fol. 493] Q. Will you relate briefly the history of Kentucky Utilities electric service to Tazewell and New Tazewell?

A. So far as we can determine electric service has been supplied to these communities at least as early as 1920 by Claiborne County Power & Light Company.

The Dixie Power & Light Company was incorporated September 7, 1922, and subsequently thereafter acquired the facilities and business of Claiborne County Power & Light Company.

Q. I believe if you talk over a little this way it may be easier for the Judge to follow your testimony.

A. In 1927 Kentucky Utilities acquired the capital stock of Dixie Power & Light Company, and since that date until 1954 Dixie Power & Light Company was a wholly owned subsidiary of Kentucky Utilities.

In 1954 Power & Light transferred its assets to the Kentucky Utilities Company and was dissolved. Subsequent to that date Kentucky Utilities has continued service to the Tazewell area.

Mr. Marshall: Now we offer for filing as Exhibit No. 1 a photostatic copy, which has been authenticated by stipulation, of a certified copy of minutes of the Quarterly County Court of Claiborne County, Tennessee, as recorded [fol. 494] in Minute Book J. page 567, of the records of that court of a meeting of that court on April 5, 1926, which minutes establish the granting at that time to Dixie Power & Light Company, its successors and assigns, of a franchise to construct and maintain power and light lines along any of the public highways in Claiborne County, Tennessee.

(Exhibit No. 1 was filed.)

We next offer for filing as Exhibit No. 2 a similarly authenticated copy of a certified copy of an order of the Railroad and Public Commission of Tennessee, entered October 15, 1926 in Docket No. 1178 on the docket of such commission in which order made on the joint application of the Quarterly County Court of Claiborne County and

of Dixie Power & Light and the operation by KU of the electric properties in the territories covered by the franchise?

A. I know of no such action on the part of the Tennessee Commission.

Mr. Marshall: If the Court please, the answer and counter-claim of the Mayors of the two towns sets out the dates of incorporation of the towns. I assume that those dates [fol. 498] may be stipulated in evidence as being correct.

Mr. McCarthy: Yes.

Mr. Marshall: Then it may be stipulated in evidence that the town of Tazewell was incorporated as a municipality on November 17, 1954, and the town of New Tazewell was so incorporated on November 19, 1954.

By Mr. Marshall:

Q. In 1952 did Kentucky Utilities, Tennessee Valley Authority and Powell Valley Electric Cooperative enter into an agreement relative to the supplying of electric service in the Tazewell and New Tazewell area?

A. They did.

Q. That agreement, I believe, is referred to in various documents that will later be offered in evidence as the tri-party agreement?

A. Yes, sir.

Q. And in questions I will refer to that 1952 agreement among those three parties as the tri-party agreement.

As a part of the tri-party agreement was there an agreement between KU and Powell Valley restricting or preventing either from serving customers of the other?

A. Yes, sir.

[fol. 499] Q. I hand you the original of a letter dated August 22, 1952 from David L. McNiel, the manager of Powell Valley, to Mr. E. W. Brown, the vice-president of KU, and I will ask that you read into evidence the third and fourth paragraphs of that letter.

A. The third paragraph of Mr. McNiel's letter of August 22, 1952, reads as follows:

"We understand the third paragraph of your letter as a statement of policy designed to avoid controversy with respect to the customers in Tennessee served by our re-

spective systems. It appears to us that this meaning might be clarified somewhat by a rearrangement of this sentence and we would like to suggest the following: 'We are agreed that during the term of this agreement neither Powell Valley Electric Cooperative nor the Dixie Power & Light Company will serve any customer who is receiving service from the other party.'"

The final paragraph reads:

"If this statement also satisfactorily expresses your desires, we would appreciate very much your acknowledgement by the return of one copy of this letter in order that we may feel free to execute the tri-party agreement and forward it to TVA for completion."

Mr. McCarthy: May it please the Court, at the pre-trial hearing there was no reference made to any contention of [fol. 500] behalf of KU that such an agreement existed or had any relevance to this lawsuit. As a result, it was not in the pre-trial order at all and of course we did not cover this in our brief.

When such contention is advanced we would like to state our position, which is, if that agreement is in effect it has not been violated by any action taken by any of the parties, but it is our further position that this agreement was superseded by an agreement entered into in 1958 which was broader in scope by way of time. It was a 5-year agreement subject to cancellation, and that 1958 agreement has been cancelled—it has been cancelled. It is not in effect, and it is our position that this letter agreement that is referred to now has been superseded and has no bearing on anything that could be in the lawsuit.

Also, I want to make the point that this letter agreement is not part of the tri-partite agreement. It is a separate letter understanding between Powell Valley and KU to which TVA is not a party.

Mr. Marshall: With that statement of TVA's position, may the letter be admitted?

The Court: Yes.

(Exhibit No. 6 was filed.)

[fol. 501] Mr. Ardery: I think it might be worthwhile to reiterate the position of the towns; namely, that such

Q. And representatives of KU?

A. Yes, sir.

Q. And were they also attended by representatives of Rural Electrification Administration in Washington?

A. Yes, sir.

Q. Did those meetings result in the making of any additional agreement between KU and Powell Valley?

A. Yes, sir, in January of 1958.

Q. Again I hand you a signed original of a letter agreement in the form of a letter from Kentucky Utilities to Powell Valley dated January 8, 1958, and ask if the original is signed by W. H. Skinner, vice-president of KU?

A. It is.

Q. And does this original bare the signed acceptance of [fol. 505] Powell Valley by Mr. Loyd Muncy, vice-president of Powell Valley, that acceptance being dated January 16, 1958?

A. It does.

Mr. Marshall: Again so that we may retain the original in our files, I offer in evidence as Exhibit No. 7 the January 8, 1958 letter agreement between Kentucky Utilities and Powell Valley Electric Cooperative.

(Exhibit No. 7 was filed.)

Mr. Marshall: As a matter of convenience I would just like to read the first sentence into the record.

"This letter is written to revise my letters of September 4, 1957, and December 16, 1957, for the purpose of establishing a basis for avoiding conflicts between our respective systems, in accordance with the understanding reached at the meeting held in our offices on August 13, 1957, at which were present, in addition to representatives of this Company, Mr. McNiel, your attorney, Mr. Cridlin, and Mr. Ralph Foreman of the Rural Electrification Administration, and in accordance with our further discussions of more recent dates."

[fol. 506] By Mr. Marshall:

Q. I now hand you the original of another letter on the Powell Valley letterhead addressed to Mr. Skinner, the writer of the last letter, dated January 23, 1958, signed by Mr. McNiel, manager of Powell Valley, and I will ask if that this later letter, the January 23 letter, is the letter of transmittal with which KU received the January 8, 1958 letter agreement?

A. It is.

Q. Did Powell Valley board of directors consider and approve Powell Valley entering into the January 8, 1958 agreement with Kentucky Utilities?

A. As stated in the first paragraph of Mr. McNiel's January 23 transmittal letter, the board of Powell Valley did meet and favorably accept the letter agreement of January 8, 1958.

Mr. Marshall: We offer in evidence as Exhibit No. 8 a photostatic copy of Mr. McNiel's January 23, 1958 letter to Kentucky Utilities.

(Exhibit No. 8 was filed.)

By Mr. Marshall:

Q. Mr. Duncan, the January, 1958 agreement between Kentucky Utilities and Powell Valley is now in evidence so that its precise terms can be determined by anybody. [fol. 507] As a matter of keeping the chronology of your testimony, will you just state to the Court the general terms and the provisions of the January, 1958 agreement between Kentucky Utilities and Powell Valley?

A. Generally this agreement provides that neither KU nor Powell Valley would serve any customer at any given location where service was being taken from the other party or where the customer had terminated such service and acted thereafter to obtain service from the other party.

It further provided with respect to new loads that such new loads would be served by the utility, that is Powell Valley or KU, whose facilities taking into consideration territory boundaries either fixed or following it from logical considerations was closest to such load.

Then thirdly it provided that in the event of differences

Dixie Power & Light Company the Tennessee Commission approved the granting of such franchise to Dixie Power & Light.

(Exhibit No. 2 was filed.)

We now offer in evidence Exhibit No. 3 a similarly authenticated copy of a certified copy of minutes of a meeting of the Quarterly County Court of Claiborne County held on the first Monday of July, 1952, as recorded in Minute Book Q, page 63, of the records of such court, granting the Kentucky Utilities a franchise to construct and perpetually [fol. 495] operate and maintain electric transmission and distribution lines over, along and across county highways between Cumberland Gap and New Tazewell.

(Exhibit No. 3 was filed.)

By Mr. Marshall:

Q. Mr. Duncan, what again happened in 1954 with respect to Dixie Power & Light Company?

A. It was dissolved following the transfer of all of its assets and including its 1926 franchise to Kentucky Utilities.

Mr. Marshall: We offer in evidence as Exhibit No. 4 an authenticated copy of a certified copy of an order of the Tennessee Railroad and Public Utilities Commission entered May 25, 1954 in Docket No. U-3484 on the docket of the Commission pursuant to which order the Commission approved the transfer to Kentucky Utilities of the 1926 franchise of Dixie Power & Light Company.

(Exhibit No. 4 was filed.)

I next offer in evidence as Exhibit No. 5 an authenticated copy of a certified copy of an instrument entitled "Instrument of Conveyance and Bill of Sale" dated July 31, 1954 recorded in Book of Deeds 13, pages 173 and '4 in the office of the Register of Deeds of Claiborne County, pursuant to [fol. 496] which instrument Dixie Power & Light conveyed to Kentucky Utilities of all Dixie Power & Light assets including specifically the 1926 franchise and all of the facilities used in serving the Dixie Power & Light customers.

(Exhibit No. 5 was filed.)

By Mr. Marshall:

Q. Mr. Duncan, do you have with you another copy for convenience of Exhibit No. 4, that exhibit being the 1954 order by which the Tennessee Commission approved the transfer of the 1926 franchise to Kentucky Utilities Company?

A. Yes, sir.

Q. Will you please read to the Court the first sentence in the second paragraph of the Commission's order?

A. That item reads: "Upon consideration of the petition and entire records the Commission is of the opinion and so finds that the Dixie Power Light Company supplies energy to the local distribution systems in Tazewell and New Tazewell, Tennessee, and the adjacent rural areas and also owns a franchise granted by the Quarterly County Court of Claiborne County in April, 1926 which franchise was approved by the Commission by order entered October 25, 1926 in Docket No. 1178."

Q. Can I make a comment. We have this testimony prepared and we are both maybe reading pretty fast, and I am sure we are working the reporter. I don't want to miss [fol. 497] anything and I want the record to be complete, so maybe both of us had best slow down just a little bit.

Will you next turn to the second page of the 1954 order of the Tennessee Commission and read the first numerical paragraph in the actual order of the Commission.

A. The order states: "It Is Therefore Ordered By the Commission, That: (1) The acquisition by the Kentucky Utilities Company of the franchises referred to in this application and the operation by the Kentucky Utilities Company of the electric properties in the territories covered by said franchises, be and the same are hereby approved."

Q. Since the time of that order by the Tennessee Commission has the Commission in any manner rescinded or modified or altered in any way the findings which you read a moment ago that Dixie Power & Light supplies energy to the local distribution systems in Tazewell and New Tazewell, or the order which you read just now that the Commission approved the acquisition by KU of the franchise

agreements are in restraint of trade and not binding on the citizens and power users of the area.

Mr. Marshall: We have as Exhibit No. 6 a photostatic copy of this original letter so that the signed original may be retained in the company file.

The Court: Without objection that may be done.

Mr. McCarthy: May I see that document?

Mr. Marshall: The original letter?

Mr. McCarthy: Yes.

Mr. Marshall: In referring to franchises a moment ago, I did not mention that Powell Valley has furnished to us a photostatic copy of minutes of a meeting of the Claiborne County Quarterly Court held October 7, 1940 reciting a grant to Powell Valley of the right to use the roads and highways of Claiborne County for erecting transmission lines and other parts of an electrical system.

By Mr. Marshall:

Q. I hand you a copy of those minutes which Powell Valley furnished to us and ask that you read into evidence the first recital in the resolution of the Quarterly County Court of Claiborne County.

[fol. 502] A. Immediately following the words "Resolution" "Whereas, the Powell Valley Electric Cooperative, organized and existing under the Rural Electrification Act of the State of Virginia, with its chief offices in the Town of Jonesville, Lee County, Virginia, which has as its general purpose the building and maintaining of electric light and power lines in the rural sections of the county for the purpose of furnishing rural sections not now being serviced with lights, heat and power by regular utilities companies . . ."

Q. In the 1926 franchise to Dixie Power & Light, of which you also have a copy with you on the stand, that being the franchise thereafter assigned to KU, is there any similar language to the effect that Dixie Power & Light or KU exists for the purpose of furnishing electric service "in the rural sections of the country" I believe that word is instead of county, or "for the purpose of furnishing rural sections not being served" by any other utility?

A. No, sir.

Q. Turn again to the 1940 franchise to Powell Valley and read into the record the last clause in the actual grant of this franchise.

A. This last clause reads: "It is expressly agreed and understood that this franchise is not to interfere in any way with any other electrical or enterprise that may desire to bring electric lights, heat and power into Claiborne [fol. 503] County, Tennessee."

Q. Mr. McCarthy, counsel for TVA, a moment ago stated it to be the position of TVA that the August 22, 1952 letter agreement between KU and Powell Valley had been superseded by a later agreement.

Is it the position of KU that the later agreement to which he referred superseded the 1952 agreement?

A. No, sir.

Q. Do you know of any letter, conversation, document of any kind in which either party to the 1952 letter agreement expressly undertook to terminate it?

A. No, sir.

Q. As far as you know has it been terminated or is it still in effect?

A. It is still in effect.

Q. It is correct, is it not, that there was a later agreement also entered into between the same parties, KU and Powell Valley?

A. Yes, sir. A later agreement was entered into in 1958.

Q. Will you relate briefly the circumstances which led to the making of the additional agreement between these same parties?

A. Well, as the systems of Dixie Power & Light and the KU and Powell Valley expanded, from time to time con- [fol. 504] flicts arose between Powell Valley and KU.

Both of these utilities, as well as the Rural Electrification Administration in Washington realized that these conflicts were not in the interest of either of the utilities or of the customers that they served.

Meetings were held in an attempt to devise a means by which these conflicts could be reasonably settled rather promptly.

Q. And representatives of Powell Valley attended those meetings?

A. Yes, sir.

between Powell Valley and KU each party would consult with the other in an honest effort to resolve its dispute and that the differences would be resolved on an equitable basis.

Q. Has Powell Valley undertaken to terminate the January, 1958 agreement with KU that you have just referred to?

A. Yes, sir.

Mr. Marshall: We offer in evidence as Exhibit No. 9 a photostatic copy of a letter from Powell Valley to KU [fol. 508], dated October 16, 1962 which contains a statement that the Board of Directors of Powell Valley on October 16, 1962 "authorized and directed me to inform you that the cooperative is terminating the agreement at the end of the 5-year term which term will end on January 16, 1963," and the letter is signed by Mr. Miner, manager of Powell Valley.

(Exhibit No. 9 was filed.)

By Mr. Marshall:

Q. In September of 1963 did KU receive a letter from the Mayors of Tazewell and New Tazewell with respect to service in those two municipalities?

A. It did.

Q. Will you state to the Court what that letter is and what it says?

A. This is a letter dated September 26, 1963 addressed to Mr. Floyd I. Fairman, the president of Kentucky Utilities Company, and signed by Mayor James D. DeBusk of New Tazewell and Mayor E. J. Hardin of Tazewell, Tennessee.

This letter informed us that Tazewell expected in the immediate future either to acquire the existing facilities in the Tazewell-New Tazewell area or to construct a system providing service in this area.

The letter also transmitted copies of two other letters [fol. 509] identified in the first paragraph of the September 26th letter.

Q. Did the letter also transmit a reply by Powell Valley to the Mayors dated September 24, 1963 which you testified about, is that attached?

A. Yes, sir, that is one of the two attached letters that I referred to.

The two letters are the letters dated September 11 addressed to the manager of Powell Valley Electric Cooperative and signed by Mayors Hardin and DeBusk requesting Powell Valley to provide energy for use by the consumers of the system when acquired or constructed.

The second letter which was transmitted to Mr. Fairman is dated September 24, 1963 from Mr. Ralph Miner to Mayors Hardin and DeBusk stating that service will be made available upon request as the need arises at rates and charges not in excess of those applicable to other consumers of the cooperative system.

Mr. Marshall: We offer as Exhibit No. 10 a photostatic copy of the letter from the two Mayors dated September 26, 1963 to Mr. Fairman and of the two letters transmitted with that letter.

(Exhibit No. 10 was filed.)

By Mr. Marshall:

Q. What reply did KU make to this demand of the two [fol. 510] Mayors?

A. On October 29, Mr. Fairman responded in separate letters to Mayor Hardin and Mayor DeBusk, stating that it was the firm position of Kentucky Utilities Company that the provisions of the 1958-1959 Act of Congress which authorizes TVA's self-financing program precludes TVA power being made available to these municipalities.

Mr. Marshall: Without reading the entire letter, we offer as Exhibit No. 11 a copy of Mr. Fairman's letter of October 29, 1963 to Mayor Hardin, and as Exhibit No. 12 a copy of Mr. Fairman's letter of the same date to Mayor DeBusk.

(Exhibits No. 11 and 12 were filed.)

By Mr. Marshall:

Q. What was the reply communication which Kentucky Utilities received from the two Mayors?

A. On November 6, 1963 we received a telegram signed by the two Mayors advising us that the two towns had

commenced construction of a municipal power system in Tazewell and New Tazewell and that they would appreciate prompt removal of our duplicated facilities as the construction progresses.

Q. Had Kentucky Utilities before its receipt of this telegram ever received any request from either town that it remove any facilities from the town?

[fol. 511] A. No, sir, not that I know of.

Mr. Marshall: We offer as Exhibit No. 13 a photostatic copy of the telegram of November 6, 1963 from the two Mayors to Kentucky Utilities.

(Exhibit No. 13 was filed.)

By Mr. Marshall:

Q. Mr. Duncan, does Mr. Fairman's two letters of October 29, 1963 to the two Mayors, Exhibits 11 and 12, continue to state the position of Kentucky Utilities Company with respect to the request or the demand by the two Mayors?

A. Yes, sir, they do. It is our position that the provisions of the 1959 Act, the TVA Act, preclude the supplying of TVA power to these municipalities.

The suggestion that Kentucky Utilities might be willing to dispose of certain properties is equivalent to the suggestion that we are interested in piece by piece, chunk by chunk disposing of our property and going out of business.

Kentucky Utilities served the towns—Kentucky Utilities and its predecessor has served the towns of Tazewell and New Tazewell for more than 40 years, long before Powell Valley Electric Cooperative existed.

Q. As a matter of fact before TVA existed too?

A. Yes, sir. And we certainly have no interest in selling, disposing of our properties and our business in this or any [fol. 512] other area.

Mr. Marshall: That is all.

Cross-examination.

By Mr. Pedersen:

Q. Mr. Duncan, your company does not have any franchise from either Tazewell or New Tazewell to operate in those towns since they were incorporated in 1954; is that correct?

A. No, sir. Our rights are established by the county franchise that preceded.

Q. That is all you have, is the county franchise, and the county franchise is not an exclusive franchise, is it?

A. I suppose it speaks for itself.

Mr. Marshall: It is not exclusive, we will stipulate that to save time.

By Mr. Pedersen:

Q. So others can operate in the county besides your company?

A. Other properly authorized entities. Yes, sir. I suppose so.

Q. And did you apply to either Tazewell or New Tazewell since they were incorporated to get a franchise from either of those towns?

A. Well, I frankly don't know.

[fol. 513] Q. You don't know?

A. No.

Q. But you do know that those towns were incorporated on the dates you stated?

A. Yes, sir.

Q. And you do know that those towns have the authority under Tennessee law to set up their own municipality electric systems, do you not?

A. I don't know that of my own knowledge.

Q. You do know that the franchise that you have received from the county was to operate along county roads, wasn't it?

A. That is correct.

Q. Not city streets of Tazewell?

A. There were no city streets in Tazewell at the time that franchise was issued.

Q. So you were just riding on the county franchise?

A. We were proceeding under the provisions of that franchise; yes, sir.

Q. And do you contend that Powell Valley had no authority to serve in those towns prior to the 1959 TVA Bond Act?

A. Had no authority?

Q. Yes. Is that your contention that they could not serve those two towns the same as you could serve those two [fol. 514] towns prior to the 1959 amendment to the TVA Act?

Mr. Marshall: If the Court please, I don't have any particular objection to this. It is a right broad legal question, and we have spent right many days and hours considering it in our law office.

It brings into scope the provisions of the Federal Rural Electrification Act, the Statutes of Tennessee, the Statutes of Virginia, and the Corporate Charter of Powell Valley. I don't mind Mr. Duncan taking off in those regions but he is not a lawyer.

The Court: He may be, let's find out. If you can, you may answer; if you don't know or if you don't care to answer since it does cover a legal question, you won't be required to.

A. I am not an attorney and I would prefer not to answer the question, Judge.

By Mr. Pedersen:

Q. The reason I asked the question is your emphasis upon the franchise that Powell Valley operates under. You were emphasizing this rural business and I wanted to know if it was your contention as the president of the company that they had no authority to serve in those two towns prior to the enactment of the 1959 TVA Bond Act?

A. It is my position that there is certainly a question under the provisions of their franchise as to whether they [fol. 515] they are so authorized. Again I am not an attorney but that is the reason I emphasized that portion of their franchise.

Q. So you are not prepared to say that they did not have the authority to serve in those towns?

A. No, sir.

Q. And the fact is they did serve in those towns before they were incorporated, is that not true—Powell Valley did, I mean?

A. I believe they did; yes, sir.

Q. Yes. They served in both of those towns and they served in both of the towns after they were incorporated, did they not?

A. Yes, sir.

Q. So you were not the exclusive source of power in those towns either before or after the two towns were incorporated; Powell Valley was right in there competing with you, were they not?

A. Not exclusive but the predominate source.

Q. You were competitors in the two towns when the towns were incorporated; you were competitors in the two towns when the TVA Bond Act was passed in 1959, is that not true?

A. We were competing in the area; yes, sir.

Q. You referred to the fact that the 1958 agreement between Powell Valley and your company was terminated by [fol. 516] a letter from Powell Valley. Did you dispute the fact that that contract was properly and lawfully terminated by Powell Valley in accordance with the terms of the contract?

Mr. Marshall: That is a legal question. May I answer that for the witness?

The letter agreement of January, 1958 contains the following termination provision:

"This agreement shall remain in effect for a period of five years from the date your acceptance"—Powell Valley's acceptance—"of this letter, and shall continue in effect thereafter from year to year subject to the right of either of us to terminate the agreement at the end of any annual extension."

The acceptance is dated January 16, 1958. The initial 5-year term thus would extend to January 16, 1963.

The agreement again provides that it may be terminated by either party "at the end of any annual extension."

The first annual extension would expire on January 16,

1964. Powell Valley wrote a letter saying it was terminating the agreement January 16, 1963.

It is our position that they undertook to terminate the agreement effective one year prior to the time the agreement says it could be terminated.

[fol. 517] Mr. Pedersen: In other words, it is your position that it is a 6-year agreement instead of a 5-year agreement; is that correct, Mr. Marshall?

Mr. Marshall: Yes, I think that is in substance what this language says. It is not phrased that way but it says it can be terminated at the end of any annual extension.

Mr. Pedersen: Certainly it is our position that it can be terminated at the end of five years if the party did not want any annual extension. An annual extension was just a matter of option of the parties who want to extend it and Powell Valley gave notice at the time that they wanted to end it at five years. That is the position of the defendant.

Is there any question in your mind as to the time element in which it was terminated, that we gave—that the Powell Valley gave the proper notice within the meaning of the agreement if it could be terminated at the end of five years?

Mr. Marshall: I don't want to belabor the point or magnify it out of its true importance, but yes, it is our position that the agreement could not be terminated until January 16, 1964 whereas Powell Valley undertook to terminate it one year prior to that date.

[fol. 518] Mr. Pedersen: That is all.

By Mr. Ardery:

Q. Mr. Duncan, you say you don't know of any effort that Kentucky Utilities made to obtain a franchise from either one of these towns; is that correct?

A. That is correct; yes, sir.

Q. Do you know of any offer that Kentucky Utilities made, we will say, with respect to the town of New Tazewell, wherefor you wrote a check to the town of New Tazewell in the amount of $1,967.65 and on that check was written "For perpetual franchise" which check was transmitted to the Board of Aldermen?

A. Mr. Ardery, your reference to the check reminds me that I have heard of such an offer; yes, sir.

Q. So the KU did make an offer of $1,962.65 to the Town of New Tazewell for return of a perpetual franchise?

A. I don't have the offer before me and I—if you say that is what the offer consisted of, I suppose the document would speak for itself.

Q. Was the check returned to you?

A. I don't know.

Q. Was a similar check with the words written on it "In return for a perpetual franchise" made to the Town of Tazewell?

A. Mr. Ardery, this is an area that I am not familiar [fol. 519] with. I believe the information can be supplied by another witness.

Q. I thought it was your testimony the company had made no effort to obtain a franchise from either of these towns?

Mr. Marshall: I believe it was his testimony he did not know.

Q. (Continuing) But you do know about the checks?

A. Yes, I recall having heard of the checks. What happened to them, how many checks there were, what the provisions were associated with the issuance of the check, or their disposition, I do not know.

Q. What would be the purpose of such a check?

A. I am afraid I can't answer that.

Q. Doesn't KU have a practice of going to a town and trying to get them to give a franchise for return say, of three per cent of the gross revenues that is received over the period of time?

A. We have franchises providing for an amount by the company of three per cent of our, I believe it is residential figure, during the term of the contract.

Q. Isn't that a very common practice of KU in seeking a franchise from towns which are reluctant to grant a franchise to Kentucky Utilities?

A. That is a common practice of KU. I would not sub- [fol. 520] scribe to the latter part of your question.

Q. How long have you been doing this?

A. I don't recall the day but I would say the first of those franchises were in the late 1950s.

Q. It is of comparative recent origin, isn't it?

A. Depending on your frame of reference.

Q. And KU does this only when they cannot get a perpetual or 20 year franchise—it was 20 years or more, actually, isn't that correct?

A. I believe they are offered in connection with the granting of a 20-year franchise.

Q. But on these checks, if you recall, or would you deny was typed "For perpetual franchise"?

A. I can't deny it; no, sir.

Q. You said in response to Mr. Marshall's question about the position of the Kentucky Utilities Company with respect to the offer that the city made—the cities made, to purchase your facilities, that KU was not interested in chunk by chunk disposing of your property in this or any other area; is that right?

A. That is right; yes, sir.

Q. What about the Town of Hickman, Kentucky?

A. It is our position that the provisions of the 1959 TVA Financing Act constituted an open invitation in several other cities to acquire the facilities of their present sup- [fol. 521] plier as a means of ultimately obtaining service from TVA.

Q. The point of it, KU has disposed of certain of its properties, has it not?

A. Yes, sir.

Q. At the request of local people?

A. At the insistence of local people; yes, sir.

Q. Now, if I understand you correctly, it is your view that the 1958 agreement that you say prohibits Powell Valley from serving any customers that have been customers of KU is still in existence; is that right?

A. The 1958 agreement, frankly, I don't know whether it is now still in existence or not.

My position, I believe, as stated was that it could not be terminated prior to January 16, 1964.

Q. Well, now, subsequent to your receiving of notice of termination didn't a delegation from Kentucky Utilities pay a call at the offices of Powell Valley Electric Coopera-

tive of Jonesville, Virginia in an effort to get them to make a new agreement?

A. I don't know, Mr. Ardery.

Q. You don't know whether any group of representatives of KU subsequently to receipt of that notice of termination went to the offices of Powell Valley and paid a call on the Board of Directors seeking the institution of a new agree-
[fol. 522] ment?

A. Yes, sir. I recall that a meeting was held. Who attended it or whether it was with the Board of Directors, at the moment I don't recall.

Q. Don't you know that? You have been, before you became a chief executive officer, you were in charge of operations of KU?

A. That is correct.

Q. You would generally be cognizant of what was going on in the system at any moment, would you not?

A. Frankly, Mr. Ardery, that area of activity did not fall within my area of responsibility.

I knew in a general way of such activities but it was not my responsibility to conduct such activities.

Q. Let me be sure I understand you. Did you know or did you not know of the visit of a delegation from Kentucky Utilities Company to the Board of Directors of Powell Valley Electric Cooperative at Jonesville, Virginia subsequent to the notice of termination which you had then prior to that received, in an effort to get a new agreement whereby neither KU nor Powell Valley would serve the other's customers?

A. Your question started with "Did I know"

Q. Did you know that that delegation paid that call?

[fol. 523] A. At the time that call was made it was not made on any instruction from me.

Q. I did not ask you that.

A. All right. I am trying to get a date or the period identified. Subsequent to that time I had been informed that a meeting was held between KU and representatives of the city.

Q. Of Powell Valley?

A. I mean of Powell Valley.

Q. What was the purpose of that meeting?

A. I can't say, Mr. Ardery.

Q. Was it not to get a new agreement because you realized that the old agreement had been terminated?

A. I can't say that.

Q. Now the letter that the Mayors sent you telling you—may I have that letter, the letter Exhibit No. 10—this letter to your Mr. Fairman from the Mayor of the town dated September 26, 1963, will you read the last two paragraphs of that letter?

A. "We will be glad to consider any proposal Kentucky Utilities may have for acquisition of existing facilities in this area and we would expect to pay for these facilities the depreciated cost plus reasonable severance."

End of paragraph.

"If you are at all interested please let us have your early [fol. 524] response."

Q. How long was it after that letter was received that you responded to it?

A. I don't have the date of the receipt but the Mayors' letter is dated September 26. Mr. Fairman response is dated October 29th.

Q. So that was at least more than a month later?

A. Yes.

Q. In the meantime had you had a call by telephone from the Mayors?

A. Had I?

Q. Yes. Didn't they call you on the telephone and discuss the matter with you personally?

A. I seem to recall a telephone call from one of the Mayors.

Q. Did you make any comment at their request of what the position would be that KU was going to take, in that telephone call?

A. I don't recall any such response, Mr. Ardery.

Q. They were interested, or the Mayor that talked to you was interested in discovering what the position of KU was having not received an answer to his letter, wasn't he?

A. As I recall that was the purpose of his telephone call; yes, sir.

Q. And again you took no position?

[fol. 525] A. I said that I did not recall the position that I took in that conversation.

Q. Paragraph three of the letter agreement of January 8, 1958 says that in any instance where there are differences between us as to the application of paragraph one or two above, each party will consult with the other in an honest effort to resolve their differences and in all such instances the differences of the parties shall be resolved on an equitable basis.

What does that mean? Suppose you disagree? They say this man is their customer and you say it is yours? If this is an agreement as to how you are going to divide customers and allocate customers, what are you going to do in a case like that?

A. Well, I suppose the intent of the words "an equitable basis" would be to provide that in fairness to all parties concerned.

Q. Would your idea of what was equitable be different, perhaps, than theirs?

A. Conceivable; yes, sir.

Q. What would happen in such a case?

A. We would attempt to resolve it.

Q. In other words, all you have got is an agreement to attempt to resolve any disagreements?

A. Yes, sir, and I believe efforts were made along those [fol. 526] lines in a number of instances and that problems were resolved from time to time.

Q. Mr. Duncan, did Powell Valley throughout the entire history of this service in this area here get its power from TVA?

A. What period is that?

Q. Did they ever buy any power from KU for service in this area?

A. In the Claiborne County area, not that I know of.

Q. Did KU ever refuse service to any who requested service in this area?

A. Mr. Ardery, ever is a long time. Let me put it this way. Certainly there has been no such refusal in the past ten or fifteen years, that I know of.

Mr. Rowntree: May I ask counsel to clarify his question, whether he is talking about refusal to individual customers?

Mr. Ardery: I am asking if there were ever any occa-

sions—KU says it has the long history of having served in this area and I am only asking if they served all people who wanted service or just some of the people who wanted service.

A. The one possible exception to that would be in an instance in which a prospective customer had requested [fol. 527] service from KU in an area supplied by Powell Valley in an area in which under this 1958 agreement the parties agreed that Powell Valley rather than Kentucky Utilities would serve that customer.

Q. But you don't say in any case the agreement of Powell Valley to serve was not simply a consequence of KU's refusal to serve?

A. Read the question, please.

(The last question was read by the reporter.)

A. It is possible that that agreement might result from a refusal by KU to serve under the provisions of this 1958 agreement, but it is not my position that all of the customers that Powell Valley served necessarily follow any refusal by KU to serve.

Q. Mr. Duncan, is this a rural area or urban area, in your view?

A. What area are you talking about?

Q. The area of the whole community that expanded, I expect the two towns.

A. That is an urban area.

Q. You are acquainted, as you have testified in your testimony in chief, with the position taken by the REA. What is their position about this?

A. I don't know. I testified——

Q. I don't think it calls on you to make a law to say that [fol. 528] the REA says if there are less than 1,500 it is a rural area, are you acquainted with that?

A. I have heard that section of the Act referred to; yes, sir.

Q. Did Kentucky Utilities file all of the rates with the Public Utilities Commission of Tennessee covering all of the charges that it has made by its rates in Tennessee? Did you have a rate filed for all the rates that were in effect in the section?

A. Here again, Mr. Ardery, this is an area that did or has not been my responsibility. It is my understanding that the rates applicable in—that everything applicable in Tennessee has been filed with the Commission for filing, the Tennessee Commission.

Q. Who would be the representative of your organization whose particular attention would be directed to this?

A. Mr. Skinner's.

Q. Is he to testify?

A. No, sir.

Q. Can you say as chief executive officer of the company whether you had charged any rates that haven't been on file with the Tennessee Public Service Commission?

A. It is my recollection that the Commission declined or did not accept certain reduced rates in Tennessee that [fol. 529] were submitted for filing.

Q. Weren't those, as you know, the reduced rates in conjunction with certain other rates that were increased?

A. I don't recall that that was the case, Mr. Ardery.

Q. Can you say whether or not the company has ever picked out certain individuals and offered to them a special rate which was not offered to other individuals in the same class as an effort to get them on KU's side of this battle?

A. No, sir.

Q. They have not done it?

A. I can't say that that was done.

Mr. Ardery: That is all.

Redirect examination.

By Mr. Marshall:

Q. What was your title before you became chief executive officer and president?

A. Vice-president in charge of operations.

Q. How long had you been vice-president in charge of operations?

A. I believe in 1957.

Q. And had you been in that same operations department prior to the time you became in charge of that department?

[fol. 530] A. Yes, sir.

Q. For how long a time?

A. Since 1940.

Q. Was the handling or acquiring, dealing in franchises, part of the operations department's responsibility?

A. No. sir.

Q. And you have already testified that the filing, handling, making of rates was not a part of the operations department's responsibility?

A. Yes, sir.

Q. Did you in any manner transmit to either Tazewell or New Tazewell the checks to which Mr. Ardery referred with respect to franchise, the check having "For perpetual franchise" as he says?

A. No, sir.

Q. Was that check transmitted by anyone in your department, operations department?

A. No.

Q. Do you know how in fact it was transmitted?

A. No, sir.

Q. Do you know whether it was transmitted by letter or personally handled or do you know the comments with which it was transmitted either in a letter or personally?

A. No, sir, I don't.

Q. Do you know whether the 1962 franchise to Dixie [fol. 531] Power & Light thereafter transferred to KU and owned by KU at the time of this check is or is not a perpetual franchise?

A. I would have to refer to the instrument, perhaps, to draw a legal conclusion about it.

Q. Has the company been advised by counsel that it is a perpetual franchise?

A. Yes.

Q. What was your answer?

A. Yes, sir.

Q. Has the company long prior to this transmittal of this check been advised by counsel that under the law of the State of Tennesse this 1926 franchise in the county prior to incorporation of the two municipalities became upon incorporation an effective franchise in those municipalities?

A. Yes, sir.

Q. Mr. Ardery mentioned Hickman. I don't remember whether he named any other town in which the distribution

facilities of KU have been sold. I will name some others. Glassgow, Princeton, Fulton, South Fulton and Hickman.

Were every one of those towns in the 1959 TVA Act named as a town which can be furnished TVA power as exceptions to the operations of that Act?

[fol. 532] A. That is my understanding of the Act.

Q. In every one of those towns in fact you have sold your distribution system, and had the cities prior to the time you finally sold taken active steps to condemn and under the power of eminent domain acquire those distribution facilities that you sold?

A. Yes, sir.

Q. Had the company in very extensive litigation in those cases resisted as far as it thought it could, successfully resist, the condemnation of those facilities that you finally sold?

A. Yes, sir.

Q. Were they what you would classify as voluntary sales of facilities by the company?

A. No.

Q. Mr. Ardery classed the January, 1958 agreement as one which in substance just said in the event of controversy you, Kentucky Utilities and Powell Valley, would sit down and try to work things out. Did that agreement in Section 2 provide standards under which you would do or sit down and try to work things out?

A. Yes, sir.

Q. Specifically the first paragraph provides for existing service and existing customers, didn't it?

A. It did.

[fol. 533] Q. And the second paragraph provided the standard for service to new loads, did it not?

A. Yes.

Q. What was the standard as to new loads that developed after the agreement?

A. You are asking what that standard was?

Q. Yes.

A. That Powell Valley or KU having facilities closest to such load would serve that load taking into consideration territorial boundaries, either fixed or following some logical consideration.

Q. In other words, whoever had the closest facility is it basically, is that correct?

A. That basically is it.

Q. Mr. Pedersen asked you if KU and Powell Valley were not competitors in Tazewell and New Tazewell when the 1959 TVA Act was enacted. The effective date of that Act was August 6, 1959.

At that time, in August, 1959, was the January, 1958 agreement between Powell Valley and Kentucky Utilities in effect?

A. Yes, sir.

Q. Were the parties operating under that agreement?

A. This is the January, 1958 agreement you are refer-
[fol. 534] ring to?

Q. Yes.

A. Yes.

Q. I realize that details of the operation in Tazewell and New Tazewell were not your responsibility, but do you in fact know whether controversies or conflicts in those municipalities were being resolved by Kentucky Utilities and Powell Valley in 1959 pursuant to this January, 1958 agreement between them?

A. I can't say with respect to 1959 specifically, but I do know that conflicts were resolved over a considerable period of time following this January, 1958 agreement pursuant to its terms.

Q. In other words, you are saying that in effect that you don't know when relations broke down, is that—I am trying to get what you mean.

A. No. Insofar as the occurrence of any conflict in the year 1959, or in any particular portion of tht year, I can't testify as to a particular occurrence, but I do know that conflicts did arise subsequent to January, 1958 which were resolved pursuant to this January, 1958 agreement.

Q. And that agreement was in effect, as far as you are concerned, until whenever Powell Valley's cancellation of it became effective?

A. Right.

[fol. 535] Q. Which would be 1963 at the earliest?

A. 1964.

Q. By Powell Valley's version, January, 1963?

A. Yes, sir.

Mr. Marshall: That is all.

Recross-examination.

By Mr. Pedersen:

Q. Mr. Duncan, you mentioned a number of towns in which Kentucy Utilities had been serving that which Congress said that TVA could serve under the exceptions to the 1959 Bond Act; is that correct, you mentioned a number of towns?

A. I mentioned a number of towns.

Q. That Congress said could have TVA power, right?

A. Congress—the Act provided that those towns would constitute exceptions to a limitation on the service area of TVA.

Q. In short, they could get TVA power?

A. That TVA would not be in violation of the Act in supplying power to those towns.

Q. I am not quibbling about words and terminology. I am just trying to get the idea that these towns were open to get TVA service, isn't that correct?

A. A lot of people thought they were open territory; yes.

[fol. 536] Q. And I think you said in every one of those towns your company litigated it to the end of the line, did they not?

A. No, sir. I think I responded in that we pressed those matters as far as we thought we reasonably could.

Q. In the courts?

Mr. Marshall: I believe he named certain ones with respect to litigation, Mr. Pedersen.

A. I don't recall.

Q. Put it in another way, is it the policy of your company to litigate every effort of these towns to get TVA electricity?

A. Mr. Pedersen, it is a policy of Kentucky Utilities that we avoid insofar as reasonably possible the disposing of any property. That is basic. We are in the business of generating and selling electric service and not in the business of selling property.

In a specific situation, such as arose in connection with

Paducah and these other towns, the company resisted those efforts in accordance with that general policy.

Q. And is it not true that you have brought other litigation against TVA to stop TVA, say, from serving New York Mining Company up there, and that you have litiga- [fol. 537] tion pending now about this service to Big Rivers, and you have this litigation pending. Is it the policy of Kentucky Utilities to litigate every question about TVA service to any new customers in these towns?

Mr. Marshall: I think this line of questioning is highly objectionable, and I do object to it.

Mr. Pedersen: I don't think it is objectionable. He brought up the fact of what the towns done.

Mr. Marshall: I didn't bring it up. Mr. Ardery brought it up.

I reluctantly suggest that Mr. Pedersen is trying to make a little newspaper copy by saying that KU is trying to keep the towns from getting TVA power.

The Court: What is the purpose of it, Mr. Pedersen?

Mr. Pedersen: I think your Honor's attention was distracted on another matter at the time this came up, but the question was, they started out about if Hickman——

The Court: I heard that.

Mr. Pedersen: Mr. Duncan had said that they were not engaging in piecemeal giving up of their company and properties in these various towns, and then Mr. Marshall enlarged upon that about various other towns that wanted [fol. 538] TVA power that Congress had excluded in the Bond Act.

In other words, that TVA could serve in those towns, and it was brought out that they did not yield to that voluntarily, they litigated it to the end of the road, and that was what I was trying to explain here. What is their policy, is it just to litigate everything or to try to settle some of these controversies.

I did not plow up the question. I was just trying to find out what is KU's policy, is it just to litigate every town, town by town, and customer by customer? I did not explore into this at all. Mr. Marshall brought it up and I was trying to see what the policy was.

Mr. Marshall: If the Court please, I did not bring it up. Mr. Ardery brought it up.

The Court: Well, the Court has not caught the point from counsel on either side, yet.

I understand in this Act that certain towns were named, and the Act provided that TVA should continue to serve these towns, including our little big town over here in Anderson County, and it included Hickman, Kentucky.

Now I understand that much, but I don't understand [fol. 539] the other point of either side about this.

Mr. Marshall: There is no point. Mr. Ardery, your Honor, tended to suggest that KU made voluntary sales in these towns who wanted TVA. Mr. Ardery pointed out in that suggestion that we did not make voluntary sales to these towns which were named——

The Court: It is your position that you litigated——

Mr. Marshall: We litigated as far as we thought it was feasible.

I was just responding to their point.

The Court: I believe you have cleared it up. They litigate so far as they thought it was reasonably possible.

Mr. Marshall: Yes.

Mr. Pedersen: That is all I was trying to show. The background, your Honor, of this litigation.

The Court: Any other question for this gentleman?

I would like to ask one. I don't know whether it has any pertinency or not, but I notice in the record that on August 6, 1959 in Tazewell that Kentucky Utilities supplied 371 customers to Powell Valley's 19, and in New Tazewell KU supplied 256 to Powell Valley's 12.

[fol. 540] Now what I would like to know how did those 19 get into Tazewell and the 12 into New Tazewell if the Powell Valley was serving the rural area and KU was serving the town; how did these 12 and 19 get in there? Is that because of special requests of the residents of the town or because of some extraordinary situation.

The Witness: Judge, there will be another witness a little later that could supply the details.

The Court: That ends that, he doesn't know. Any other questions from this witness?

Mr. Marshall: No.

(Witness excused.)

The Court: All right. Take a short recess, gentlemen.

(A short recess was taken.)

The Court: Gentlemen, you may proceed with the testimony.

HOWARD B. ASHER, called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Welch:

Q. Will you state your name, please?

[fol. 541] A. Howard B. Asher.

Q. What is your position with the Kentucky Utilities Company?

A. Manager of the Mountain Division of Kentucky Utilities.

Q. Mr. Asher, suppose you turn around and talk to the Judge.

A. All right, sir.

Q. Where is your office located?

A. Pineville, Kentucky.

Q. How long have you been with Kentucky Utilities, Mr. Asher?

A. 40 years.

Q. Have you spent the entire 40 years in the Mountain Division?

A. Yes, sir.

Q. What territory is the Mountain Division comprised of?

A. The Mountain Division is comprised of nine counties in Southeastern Kentucky, part of Claiborne County, Tennessee, and I am also manager of the Old Dominion Power Company, which is a wholly owned subsidiary of Kentucky Utilities and operates in four counties in Southwest Virginia.

Q. Those operations of Kentucky Utilities in Tazewell

and New Tazewell, Tennessee, come under the jurisdiction [fol. 542] of your office?

A. Yes, sir.

Q. Mr. Asher, when was the first business contact that you had with Powell Valley Electric Cooperative?

A. Powell Valley, as I recall, was organized the latter part of 1958, and at that time part of my duties were power sales engineer and I assisted in negotiating the power contract between Powell Valley REA and Old Dominion Power Company which was, I believe, executed in February of 1939.

Q. Did Old Dominion Power Company sell power to Powell Valley for a time?

A. Yes, sir, but we have supplied to Powell Valley from 1939 until the latter part of 1948.

Q. When did the first dispute arise to your knowledge between Powell Valley and Kentucky Utilities or Old Dominion over customers of the service area?

A. The first dispute of any consequence that I remember was during 1945.

I might state that in the early 1940s, up to 1945, there was not very much construction because of the fact that the use of materials was controlled by the War Production Board due to the World War II situation, and this first conflict developed during 1945, a major conflict.

Q. What was the nature of that conflict?

A. The Old Dominion Power Company had received a [fol. 543] request from the Town of Ewing to supply service to their small water system.

Q. Is that Ewing, Virginia?

A. Ewing, Virginia, yes, sir, to supply service, I believe, to a little chlorinating plant in connection with their water system and, of course it was necessary to make application to the War Production Board in order to use the materials required to provide service and this approval was granted the Old Dominion Company.

Old Dominion began the construction of this extension and at that same time the restrictions imposed by the War Production Board on the use of materials was removed and Powell Valley very rapidly, I would say overnight, constructed an extension to serve this same area.

Q. What was the end result of that dispute?

A. Well, it created quite a lot of controversy and a suit was filed, was consummated by Powell Valley, I think, serving part of the customers and Old Dominion part of the customers.

The suit was withdrawn, was never actually determined in court.

Q. After that dispute you just described with the Ewing Water Company, did your company have any other dispute with Powell Valley in serving customers?

The Court: What was the name of that company?

[fol. 544] Mr. Welch: It is at the Town of Ewing, Virginia.

A. Yes, sir, we had several disputes or conflicts primarily in, I would say the more in Tennessee than there was in Virginia, but it was in both areas.

Q. What steps, if any, were taken to resolve those disputes?

A. We would meet with representatives of Powell Valley and endeavor to resolve those disputes.

Q. Did you reach any agreement with them?

A. In 1952 there was an agreement between Powell Valley, TVA and Kentucky Utilities in an effort to resolve this matter.

Q. I hand you the original carbon signed of a letter dated August 22, 1952 from Davis L. McNiel, manager of Powell Valley, to Mr. E. W. Brown, vice-president of Kentucky Utilities——

Mr. Marshall: Wait a minute, that isn't what you have.

Q. (Continuing) A photostatic copy of which has already been filed as Exhibit No. 6, and ask you if that is the agreement to which you are referring?

A. Yes, sir. This agreement, of course, is between Dixie Power & Light Company and Powell Valley, which is now owned by KU.

[fol. 545] Q. Did this agreement have the result of ending the dispute as to customers in the areas between Kentucky Utilities and Powell Valley?

A. No, sir, it did not. The 1952 agreement pertained primarily to service to customers then being served by each of the utilities, and there was still conflicts which developed

due to the construction of extensions by Powell Valley of major nature to serve customers that could readily be served by a service drop or at least a one or two-pole extension from the facilities of Kentucky Utilities.

Q. Are these extensions which you have described that were constructed by Powell Valley, were they constructed in both Virginia and Tennessee?

A. Primarily in Tennessee. The State of Virginia was pretty well resolved in 1960 when the General Assembly of Virginia passed what is known as the Utilities Facilities Act and that gave the State Corporation Commission of Virginia the power to delegate the service areas of all utilities operating in the State of Virginia, and to comply with the provisions of the Utilities Facilities Act it was necessary that each utility prepare maps showing the actual geographical area that would serve in event there was any difference of opinion between the utilities with reference to the adjoining areas, and it was necessary to get with representatives of the respective utilities and agree on a [fol. 546] geographical boundary.

If that could not be agreed on then the matter was resolved by the State Corporation Commission and a definite geographical boundary established, and as a result of that we had very few or no conflicts in the Virginia area after the passage of the Utilities Facilities Act.

Q. After this 1952 agreement with Powell Valley to which you referred, did KU and Powell Valley enter into any further agreements concerning customers or service area?

A. Yes, sir.

Q. What were the circumstances which led to making the further agreement?

A. The experience in Virginia certainly indicated to both parties that it was much more practical to establish a service area, and an agreement was reached in 1958 which would more definitely describe or outline areas of the two utilities.

Q. Mr. Asher, did you participate in any of the negotiations leading up to this 1958 agreement?

A. Yes, sir. I was in some discussions with reference to the agreement, and I was at a meeting in our general offices in Lexington between members of Kentucky Utilities or-

ganization, of Powell Valley REA, and from the office of the National Administrator of REA in Washington.

Q. When was that meeting?

[fol. 547] A. It was during the middle part of 1957. I believe about August of 1957.

Q. Mr. Asher, I hand you a signed duplicate original of a letter dated January 8, 1958 from William H. Skinner, vice-president of Kentucky Utilities, to Powell Valley Electric Cooperative, a photostatic copy of which has been offered in evidence as Exhibit No. 7, and ask you if that is an agreement to which you have been referring?

A. Yes, sir, it is.

Q. How would you describe the relationship of Kentucky Utilities and Powell Valley under this agreement?

A. I would say our relationship improved very substantially and were excellent. We had no particular difficulties after acceptance of the 1958 agreement.

Q. Did any questions or disputes arise with respect to service of particular areas with customers?

A. Yes, sir. There were some disputes which developed, not of a major nature, that was brought to our attention.

Q. Can you give me an example of a dispute that arose?

A. I can name you one. In 1960 Norris Craft was establishing a little manufacturing plant that built boats, was established in the New Tazewell area. They requested service from Powell Valley, and the situation was looked over [fol. 548] by both Mr. Berry and me.

Q. Who was Mr. Berry?

A. Mr. Berry was at that time the manager of Powell Valley REA, and it was determined on the 1958 agreement, that it was in the service area of KU and therefore Kentucky Utilities extended service to this customer.

Q. After the execution of that 1958 agreement was anything done towards a permanent resolve of these questions like this Norris Craft of which you spoke?

A. Yes. In discussions with Mr. Fletcher, who was manager prior to Mr. Berry——

Q. Manager of Powell Valley?

A. Manager of Powell Valley. We discussed with him the feasibility and desirability of developing a map which would outline the geographic areas that would be served by each utility and would conform to the 1958 agreement, and

before anything was done Mr. Berry died of a heart attack, I believe during the latter part of 1959.

Q. You mean Mr. Fletcher?

A. I mean Mr. Fletcher, I beg your pardon, and he was succeeded by Mr. Berry.

Sometime during the early part of 1960 the matter was discussed with Mr. Berry, and after the Norris Craft situation and possibly one or two others, it was agreed that a map would be developed which would geographically out-
[fol. 549] line the service areas of Powell Valley and Kentucky Utilities.

Q. What steps were taken toward the preparation of this map?

Mr. Ardery: If your Honor please, I would like to interpose an objection here. There has been some testimony about Mr. McNiel, Mr. Fletcher, Mr. Berry. All three of these people are dead.

I don't think it is proper to have evidence in here as to what actions went on between them and KU.

The Court: Overruled. You are not seeking any judgment against these dead men, are you?

Mr. Welch: No, sir, we are not.

The Witness: Would you read the question, please?

(The question was read by the reporter.)

A. A member of engineering department of Kentucky Utilities was assigned to work with Mr. Harry Rowe, who was then employed as service man by Powell Valley in the Tazewell area, and Mr. Osborne and Mr. Rowe were instructed to go over the entire area and endeavor to establish what they would consider a reasonable geographical boundary taking into consideration the 1958 agreement, any unusual topographical situations, or any unusual construction or engineering problem that might be involved [fol. 550] in determining who would serve the area which really was between the ends of the facilities of the existing two utilities.

Q. Approximately how much time was spent in the preparation of these maps?

A. I would say it was possibly three to four weeks of work in the field, and then of course some work in the

office afterwards. It may have required six or seven weeks to complete the whole project.

Q. After Mr. Rowe and Mr. Osborne finished the field work, what did you do with the maps or the work that they had done?

A. A copy of—well, the field maps were then reviewed by both Mr. Berry and myself.

Q. What were these field maps, could you describe them?

A. Well, the field maps used by Mr. Osborne and Mr. Rowe were prepared by the U. S. Geodetic Survey and were government maps of the particular area involved.

Q. Do you mean the United States Geological Survey?

A. Yes. The field notes were reviewed by Mr. Berry and myself and we agreed that was a reasonable, logical and satisfactory outline of the boundary, and therefore the final maps were prepared from field notes.

[fol. 551] Q. After these final maps were prepared from the field notes, what did you do with them?

A. A copy of the maps were furnished to the Kentucky Utilities service representatives in the Tazewell areas and a copy of the map was furnished to Mr. Rowe of Powell Valley REA, who was the manager in the Tazewell areas.

Q. To your knowledge were these maps ever formally approved by either Powell Valley or Kentucky Utilities?

A. No, sir, they were not. As far as I know there is no action taken by Kentucky Utilities to formally approve the maps, and to my knowledge none was taken by Powell Valley.

Q. What use was made of these maps?

A. In future cases where there might be some question as to which utility would serve a customer, the maps were used in determining the service area in which the customer resided, and that was the basis for determining who would serve the customer.

Q. Who would use the map to make this determination?

A. The field representatives would use them if the situation developed where they did not come to an agreement, then they would be used by Mr. Berry or myself.

Q. Can you give me an example of a service area or customer question which you resolved with Mr. Berry by using [fol. 552] the maps?

A. Yes, sir. I can give you an outline of the situation which developed.

It was service to a Fleet Oil Station on Highway 25-E at the intersection with, I believe Tennessee 419 in what is known as Patterson Crossroads.

Our representative constructed service to this station. This matter was called to my attention by Mr. Berry, and he says, "I am sure that that customer is in our service area as determined from the maps."

We checked the matter and we agreed with Mr. Berry that a mistake had been made. It was in Powell Valley's service area, and we advised Mr. Berry that if he so desired we would remove the service.

Q. Were the maps ever used to determine a service area dispute at the time when Mr. Miner was manager of the Powell Valley Electric Cooperative?

A. There is one situation with reference to providing service to a new residence being constructed by a Mr. and Mrs. Breeding, and the maps were a factor in determining the service area in which the residence was located.

Q. What was the determination in that question?

A. It was determined that the residence was in the area to be served by Kentucky Utilities.

Q. Did you serve the residence?

[fol. 553] A. We served the contractor who was constructing the residence; however, after Powell Valley advised that they desired to cancel the 1958 agreement they then constructed—after that agreement was terminated according to their interpretation, they then provided service to the Breeding residence.

Q. What was the first knowledge you had that Powell Valley was going to attempt to cancel the 1958 service area agreement?

A. The first direct knowledge I had was when I received a copy of Powell Valley's letter of October—I don't recall the exact date—in October of 1962, to Mr. Skinner advising of their intention to cancel the 1958 agreement.

Q. Mr. Asher, I hand you a set of six maps, two large maps which when placed together will form one map.

Mr. Marshall: Off the record——

(A discussion was had between counsel off the record.)

Q. (Continuing) The two large maps being a photostatic reproduction of United States Department of Interior geological survey maps. The first, or the top portion of these maps, contain in the upper righthand corner "Wheeler Quadrangle."

Is this a portion of the map prepared by Mr. Osborne [fol. 554] and Mr. Rowe as you testified?

A. Yes, sir.

Mr. Welch: We offer the top section of the map, together with the bottom section of the map, the bottom section containing the notation "Shaded Area Designates KU Territoy, Field Work by Osborne and Rowe, 7-1-60," and that is exhibit No. 14.

(Exhibit No. 14 was filed.)

By Mr. Welch:

Q. Mr. Asher, I hand you four maps designated respectively as sheet No. 1, sheet No. 2, sheet No. 1 of six sheets, and sketch showing, comparing between Dixie Power & Light Company and Powell Valley REA in New Tazewell, and then I will ask you if these are the maps, the detail maps that you referred to that were prepared by Osborne and Rowe in connection with the preparation of the large map?

A. Yes, sir, they are.

Mr. Welch: I would like to offer in evidence as Exhibits 15 through 18 these four maps.

(Exhibits No. 15 through 18 were filed.)

Mr. Welch: We have no further questions.

The Court: In order to get this clear, would you explain the map to me because it just looks like a lot of blue on there to me.

Mr. Welch: May it please the Court, the man who actually [fol. 555] prepared this map, Mr. Osborne, will testify from the map and explain it in greater detail, and also Mr. Rowe.

The Court: All right.

Cross-Examination.

By Mr. McCarthy:

Q. Mr. Asher, I show you Exhibit No. 6. That is a letter from whom to whom?

A. It is a letter to Mr. E. W. Brown, vice-president of Kentucky Utilities Company, from Mr. Davis L. McNiel, manager, Powell Valley Electric Cooperative.

Q. And it was accepted by——

A. E. W. Brown for Kentucky Utilities Company.

Q. I take it then you were in error when you referred to this as an agreement among TVA?

A. Yes, sir. I am sorry. I was.

Q. You said that so far as you knew this map was never approved either by KU or Powell Valley. Did you know that it had been disapproved by Powell Valley?

A. No, sir, I did not.

Q. You are not familiar with the efforts of KU to obtain an agreement on it in 1961?

A. Yes, sir, but I did not know it had been disapproved.

Mr. McCarthy: That is all.

[fol. 556] By Mr. Ardery:

Q. Mr. Asher, how long do you say you have been the Mountain Division manager for KU?

A. 20 years.

Q. You would have been acquainted generally over those years with the conditions of service of Kentucky Utilities in the area, would you not?

A. Generally; yes, sir.

Q. Did KU ever refuse service to anyone who wanted service from Kentucky Utilities in that period of time in this area?

A. In what period of time?

Q. The period of time that you were Mountain Division manager, the 20-year period that you just mentioned?

A. There may have been some cases where service was refused to a customer; yes, sir.

Q. Mr. Asher, isn't it the truth that a very substantial amount of construction of line in this area by Powell

Valley was as a result of KU's failure to supply power to people that wanted it?

A. No, sir.

Q. You said that Kentucky Utilities through Old Dominion Power Company did supply the power at wholesale to Powell Valley for some period of time, prior to the time that Powell Valley started receiving wholesale power from TVA; is that correct?

[fol. 557] A. Yes, sir.

Q. Now with regard to what you call the Town of Ewing, is that a town?

A. It is a community.

Q. Is it an incorporated municipality?

A. No, sir.

Q. How many people live there?

A. I would say between three and four hundred, in that neighborhood.

Q. Did Powell Valley, to your knowledge, have an application for service?

A. Not to my knowledge.

Q. Did you have an application for service?

A. I am sure we did; yes, sir.

Q. You say you are sure you did?

A. Yes.

Q. Explain that, if you will, did you have a written application?

A. Mr. Ardery, at that time the people representing the Ewing Water Company had to obtain a statement from the Virginia Board of Health that this service was needed in connection with the protection of health of the people served by the water system, and they advised them that the service would be provided if it was essential to the public health and welfare, and they received such a letter from [fol. 558] the Virginia Department of Health on the basis we would serve the facilities.

Q. Isn't it a fact that the residents of that community sought service from Powell Valley and not from Kentucky Utilities?

A. I do not know, not to my knowledge.

Q. Now as head of the Mountain Division, you would have been acquainted with any efforts that Kentucky Utili-

ties made to get a franchise inside the towns of Tazewell and New Tazewell, would you not?

A. Generally, yes, sir.

Q. Are you acquainted with a check in the amount of $1,823.77 that was written out to the Town of Tazewell and on it was written "For a perpetual franchise," a check from Kentucky Utilities?

A. I am not familiar with all of the details, Mr. Ardery, but I have some knowledge of that.

Q. You know such a check was delivered to the Board of Aldermen and the Mayor of the Town of Tazewell?

A. Yes, sir.

Q. And you know that the check was not cashed?

A. No, sir, it was not cashed.

Q. It was returned to you unchased; is that correct?

[fol. 559] A. Returned to our manager, Mr. W. A. Smith.

Q. And a similar check in the amount of $1,967.65 which on or about June 11, 1963 was returned to you uncashed from New Tazewell?

A. I think that is correct; yes, sir.

Q. Mr. Asher, subsequent to the notice of termination of the 1958 agreement which Powell Valley sent to Kentucky Utilities, there was a meeting of representatives of Kentucky Utilities Company with Powell Valley representatives in Jonesville, Virginia. Did you attend that meeting?

A. Yes, sir, I did.

Q. What was the purpose of that meeting?

A. The purpose of the meeting was to outline to the directors of Powell Valley the exceptionally good working relationships which had existed under the Virginia Utilities Facilities Act and under compliance with the 1958 agreement and to encourage them to continue the agreement in future years.

Q. Did you ask them to sign a new agreement at that time?

A. No, sir.

Q. Neither you nor any representative of the group urged upon Powell Valley to retain that contract or enter into a new agreement whereby neither could serve the [fol. 560] others' customers?

A. I don't think that we specifically asked them to enter into a new agreement at that time. We did point out the

advantages of having an agreement, and we pointed out the excellent working relationship which we had enjoyed with all their representatives.

Q. Did you at that time or had you ever since that time up to the commencement of this lawsuit notify Powell Valley in writing, or otherwise, that it is your position that the 1958 agreement has never been successfully cancelled?

A. No, sir, I have not.

Mr. Ardery: That is all.

Mr. Welch: We have no further questions.

(Witness excused.)

HARRY ROWE, called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?

A. Harry Rowe.

Q. Where do you live?

A. New Tazewell, Tennessee.

[fol. 561] Q. Were you employed at one time by the Powell Valley Electric Cooperative?

A. I was.

Q. Are you here under a subpoena?

A. I am.

Q. What was your position with Powell Valley Electric Cooperative?

A. I was in charge of the maintenance and service of the Tazewell area—the Tazewell and New Tazewell area.

Q. What period of time did that cover?

A. Oh, from the early 1940s through the early part of 1962.

The Court: From when?

The Witness: About 1940.

The Court: From 1940 until 1962.

By Mr. Rowntree:

Q. When did you leave the employment of Powell Valley Electric Cooperative?

A. Along about the middle of 1962, I believe, June or July—May or June or July, somewhere.

Q. While you were employed there by Powell Valley I will ask you this, do you recall whether a problem came up with respect to territorial areas, what territory Powell Valley would serve and what territory Kentucy Utilities would serve?

[fol. 562] A. It was kind of a continuing problem inasmuch as both of the organizations were continually extending their facilities.

Q. And do you recall whether or not a settlement of that question was reached in 1958?

A. A copy of an agreement relative to this was placed in front of me in Mr. McNiel's office, I believe, or whoever was manager at the time, I forget. It was placed there and it had been signed by Mr. Muncy as vice-president, and I was told to abide by the commitments made in the agreement.

Q. Do you recall whether or not an effort was made to set forth that agreement on a map to display the lines?

A. There was.

Q. Did you do any work in connection with the map work?

A. Yes, sir, I did.

Q. How much did you do?

A. Well, I participated as the cooperative's representative in the field work.

Q. Did you receive any instructions from anybody to do that?

A. Mr. Fletcher, the manager at the time instructed me to cooperate in preparing an equitable boundary line be-

[fol. 563] tween the two organizations.

Q. You see this map on the board here, which is Exhibit No. 14. Do you recognize that to be such a map prepared pursuant to that work?

A. I would say that it is.

Q. Did you receive a printed copy of it, Mr. Rowe?

A. Yes, sir, I did.

Q. Printed somewhat in this form, or do you recall?

A. I really don't recall just exactly the form but I believe it was very similar to this.

Q. Who sent you that printed form?

A. I received it from the office of Kentucky Utilities.

Q. And did you use that map thereafter?

A. Thereafter I used that or the field map from which that was made. The field maps were actually more workable than that, and so since I was very familiar with them I used them as the basis of my work since it was easier read than that one. That one was available to me.

Q. Were disputes or were questions settled pursuant to the map from that point on, to your knowledge?

A. Yes, they were settled with that map as the basis for settlement.

Q. Mr. Rowe, what period of time was that map used, [fol. 564] to your knowledge, up to when?

A. Well, when I left the organization it was being used as the basis for taking care of conflicts in interests.

Q. And that date was when?

A. I won't be positive but I believe it was June, 1962.

Mr. Rowntree: Thank you, sir.

Mr. Ardery: No questions.

Mr. McCarthy: No questions.

(Witness excused.)

The Court: All right. Call your next witness.

JOHN OSBORNE, JR., called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?

A. John Osborne, Jr.

Q. Where are you employed now?

A. I am employed by the Old Dominion Power Company in Big Stone Gap, Virginia.

Q. Were you employed by Kentucky Utilities in the [fol. 565] Tazewell area at one time?

A. No, sir, not in the Tazewell area. I did work out of our division office.

Q. The division office over in Pineville?

A. Right.

Q. Were you in the engineering department of the division there?

A. Yes, sir, I was.

Q. What was your primary function in the engineering department?

A. Mapping, line construction. Jobs such as that.

The Court: I did not get the connection he formally worked for?

The Witness: Kentucky Utilities.

By Mr. Rowntree:

Q. In the division office, engineering branch or division office at Pineville?

A. Yes.

Q. In what period of time did that cover that you were in the engineering branch there? Was it approximately five years, or do you recall?

A. From, I believe from 1957 to 1962.

Q. During that period did you receive instructions from Mr. Asher to do any mapping work around Tazewell and New Tazewell?

[fol. 566] A. Yes, sir, I did.

Q. What were your instructions?

A. To work with Mr. Harry Rowe to establish a service area boundary that would be workable, something simple to follow for future use.

Q. What was the primary factor to determine where that line should be drawn according to the instructions?

A. The primary factor was who the customer was being served by at that time.

Q. The location of existing facilities?

A. That's right.

Q. You see this Exhibit 14 on the wall, is that a copy of the map that was prepared by you and Mr. Rowe together?

A. Yes, sir. That is a copy of the map that we prepared.

Q. I also show you Exhibits 15 through 18 and ask if these are details—I show you the caption line here, the details of that major map, Exhibit 14.

A. That's right.

Q. Now generally speaking—would you come down here, Mr. Osborne?

A. (Witness complied with request of counsel.)

Q. Can you point out where the line runs there marking the boundary between Powell Valley and Kentucky Utili-
[fol. 567] ties?

A. The shaded area is the area to be served between——

Q. Put your pen——

A. This is the shaded area. Inside of this boundary line, the shaded area, is the territory to be served by the Kentucky Utilities Company. You notice up to the Virginia line.

Q. The Kentucky line.

A. Claiborne County and Lee County line.

Q. This is the state line coming across the top of the map, is that right?

A. That's right.

Q. Is this Kentucky up in there?

A. This is Kentucky, right. Let's see, right here is Kentucky and this is Virginia.

Q. I see Cumberland Gap right here. That is right at the intersection of the three states?

A. Yes, it is.

The Court: Mr. Rowntree, I can't see, is it written on that map the area to be served by KU and the area to be served by the Powell Valley, is it written on the map itself?

Mr. Rowntree: Yes, sir. It is the shaded area, is the KU territory itself. The shaded area designates the KU terri-
[fol. 568] tory.

The Court: Let him take the pointer and point out the shaded area.

Mr. Rowntree: Start at the top and go down.

The Court: First, what do you call the shaded area?

The Witness: This is the shaded area. You see the difference in the color?

The Court: Yes.

By Mr. Rowntree:

Q. And that is the Kentucky Utilities area?

A. The shaded area is the Kentucky Utilities territory.

Q. Take it from the bottom and work it on up, pointing out the shaded area.

A. (Witness complies with request of counsel.)

Q. You have gotten up to the top in the east side of this corridor?

A. Right.

Q. That started at the southwest and went up to the state line, is that correct?

A. Yes, sir.

Q. Now start at the bottom and show the western line of this area now?

A. (Witness complies with request of counsel.) Up to [fol. 569] this point here.

Q. Is that the Powell River at that point?

A. Yes, that is the Powell River.

Q. What lays over in this direction?

A. I believe this is the cooperative from Lafollette. It is a different cooperative.

Q. There is no dispute with Powell Valley with respect to the western part of the area from the Powell River on north, is that right?

A. No, sir.

The Court: What does the extremely shaded area to the right there represent?

The Witness: This is dense forest.

Mr. Rowntree: I believe, your Honor, this might be just dense contour lines of the mountain area. This is a geological map with the contour lines on it.

By Mr. Rowntree:

Q. Will you point out where Tazewell and New Tazewell are on that map?

A. (Indicating) This is Tazewell and this is New Tazewell.

Q. All right, sir. I notice that this line does not cover all of your territory. Is that true or not? Look at Cumberland Gap up there.

[fol. 570]. A. No, sir, it does not cover all of our territory.

Q. In other words, that part up there was not an area in dispute with Powell Valley?

A. That is right.

Q. Does this hashed line indicate there was no fixed boundary between the parties there because it was not in issue?

A. Yes, sir.

Mr. Rowntree: Any questions?

The Court: While he is here, let Mr. McCarthy—do you want to examine him while he is here?

Mr. McCarthy: I have no questions.

Mr. Ardery: I have a question or two.

Cross-examination.

By Mr. Ardery:

Q. Mr. Osborne, when did you say this map was prepared?

A. It was completed July 1, 1960.

Q. July 1, 1960?

A. Yes.

Q. You say this shaded area here is Kentucky Utilities territory; is that right?

A. Yes, sir.

Q. What about all the customers in there that were at that time Powell Valley customers?

[fol. 571] A. They were left as they were.

Q. In other words, it is KU territory but there is a lot of Powell Valley service in there?

A. Yes, sir.

Q. It is your position then that despite the fact they were there being served by Powell Valley in that shaded area, that everything else except what Powell Valley was then serving belonged to Kentucky Utilities?

A. Would you repeat your question, please?

Q. I say, you have admitted that there was substantial service by Powell Valley in this shaded area at the time the map was made.

A. Yes, sir.

Q. And it is your position here that except for that serv-

ice that at that time in that area everything else belonged to Kentucky Utilities?

A. Yes, sir.

Q. Both customers that they were then serving and any new customers that might come into the area?

A. Yes.

Q. So if I started a filling station, a brand new filling station on the road right in that area, would you have to bring, would Kentucky Utilities have the preemptive right, according to your view, to serve that customer regardless of whether the Powell Valley line was closer or not?

[fol. 572] A. Yes, sir.

Q. So both with regard to your customers as you had them at that time, and with regard to all new customers in the area, as those shaded lines indicate, you consider that to be the preemptive right of Kentucky Utilities to serve?

A. Yes, sir.

Q. How many Powell Valley services were there in that shaded area at the time you drew the map?

A. I don't know, sir.

Q. There was substantial Powell Valley service in there?

A. I wouldn't say there was. I don't know—I can't determine what you mean by substantial. That carries a pretty broad——

Q. Where was the substation that it was served off of?

A. The substation was between New Tazewell and Old Tazewell, in this section here (indicating).

Q. And did that substation serve this entire area, that shaded area you have got there?

A. No, sir. A substation at Cumberland Gap served down to the Powell River section, in here, along the highway.

Q. But this substation served all the rest of it?

[fol. 573] A. Yes, sir, it did.

Q. Whose substation was that?

A. I think it was a joint station, if I am not mistaken.

Q. You don't know that it was owned by Powell Valley?

A. No, sir, I don't.

Q. Since this map was drawn there has been additional customers added to the line of Powell Valley, have there not?

A. I guess so.

Q. And some of those customers were added with the agreement of Kentucky Utilities, were they not?

A. I don't know.

Q. You couldn't say that there were no such cases as that?

A. No. My work was to prepare the map. After that I never had to go back to the field or anything to do working with this map.

Q. So you don't know how many customers Powell Valley might have added with the agreement of Kentucky Utilities?

A. No, sir, I don't.

Q. Can you identify where the corporate limits of the Town of Tazewell and New Tazewell are from this map? [fol. 574] A. No, sir, I cannot.

Q. Are any of the corporate limits outside the shaded area as the shaded area shows on that map?

A. I could not say.

Q. Can you say to the contrary? Can you say that you don't know whether the towns are all contained in this shaded area or not?

A. No, sir, I do not.

Q. You don't deny that some of the town exists outside the shaded area?

A. I could not say.

Q. You did prepare the map?

A. Yes, sir, I helped to prepared the map. Mr. Rowe and I.

Mr. Ardrey: That is all.

Redirect examination.

By Mr. Rowntree:

Q. Mr. Osborne, will you state, Mr. Ardery has asked if there was customers of Powell Valley inside the shaded area. Will you state whether or not there was customers of Kentucky Utilities outside the shaded area?

A. Yes, sir, there are customers of Kentucky Utilities outside the shaded area.

Q. You previously testified that the primary factor

governing the drawing of the line was the location of [fol. 575] customers.

A. Location of customers primarily.

Q. There were other factors involved?

A. Yes, sir, the natural topography, such as roads, creeks, or some natural boundary line where it was thought possible to use.

Q. State whether or not the ease of giving the service depending on the terrain was a feature involved in this?

A. Yes, sir, it was.

Mr. Rowntree: I believe that is all.

(Witness excused.)

The Court: Adjourn court until 1:25.

(At 12:03 p.m., court recessed until 1:25 p.m.)

[fol. 576] Afternoon Session

(At 1:30 p.m., court reconvened when the following proceedings were had.)

The Court: You may proceed, gentlemen.

Milton H. Lewis, called as a witness by and on behalf of the plaintiff, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Marshall:

Q. Please state your name for the record?

A. Milton H. Lewis.

Q. What is your position with the Kentucky Utilities Company?

A. I am assistant division manager of the Mountain Division to Mr. Asher—assistant to him.

Q. And the Mountain Division is headquartered at Pineville, Kentucky?

A. Yes, it is.

Q. I believe there has been previous testimony that the

Mountain Division includes the area of Claiborne County, Tennessee, is that correct?

A. That is correct.

Q. How long have you occupied this position?

A. Since September of 1961.

[fol. 577] Q. How long have you been with Kentucky Utilities?

A. I came with Kentucky Utilities in May, 1947.

Q. Are you a graduate engineer?

A. Yes, sir, I am.

Q. What degree and what year?

A. I received a degree of Bachelor of Science in electrical engineering in 1944 from the University of Kentucky.

Q. What did you do from that time until the time you went with Kentucky Utilities in 1947?

A. Military service.

Q. How long have you been located in Pineville?

A. The entire time since I started work with the company.

Q. Have you prepared an exhibit showing the number of customers which Kentucky Utilities and Powell Valley each supply with electric service in Tazewell and New Tazewell on July 1, 1957?

A. Yes, sir, I have such an exhibit.

Mr. Marshall: We offer this exhibit as Exhibit No. 19.

(Exhibit No. 19 was filed.)

By Mr. Marshall:

Q. On July 1, 1957 how many customers did Kentucky Utilities have in Tazewell?

[fol. 578] A. On July 1, 1957 Kentucky Utilities served 344 customers in Tazewell.

The Court: Three hundred and how many?

The Witness: 344 in the City of Tazewell.

The Court: Would you mind to talk a little louder.

A. (Continuing) We served, Kentucky Utilities served 344 customers within the corporate boundaries of Tazewell as the corporate boundaries then existed.

The Court: If he knows let him state how many Powell Valley served at that time so we can keep them together.

By Mr. Marshall:

Q. How many did Powell Valley serve—this is Tazewell on the same date, July 1, 1957?

A. Served 20 customers.

Q. How many did each of these utilities have in Tazewell on that date?

A. In New Tazewell, Kentucky Utilities served 217 and Powell Valley served 8.

Q. State the figures for the total of those combined and the percentage of the total served by Kentucky Utilities on that date?

A. In the two towns combined Kentucky Utilities served 561 customers, Powell Valley served 28. KU Company [fol. 579] served 95.3 per cent of the total customers within the towns.

Q. Within the two towns combined?

A. Within the two towns combined.

Q. On July 1, 1957 did any utility other than KU or Powell Valley supply electricity in either Tazewell or New Tazewell?

A. Not to my knowledge.

Q. Do you have another exhibit which we will offer as Exhibit No. 20 showing the kilowatt hours of electricity supplied in these same two towns during the month of June and July, 1957?

A. Yes, sir, I have.

The Court: The exhibit showing the number of customers of that date, has that been marked?

Mr. Marshall: Yes, sir. There is an extra copy I have handed the Court for convenience.

The Court: What is the number?

Mr. Marshall: That is Exhibit No. 19. Let me see. It will be offered in this order. 19, 20, 21 and 22.

(Exhibit No. 20 was filed.)

By Mr. Marshall:

Q. This particular exhibit, Exhibit No. 20 is in terms for the month of June and July, 1957, and in view of the single date of July 1, 1957, please state the reason for that [fol. 580] difference.

A. Well, sir, when you speak of kilowatt hours that is electrical energy that is consumed over some period of time. No utility that I know of keeps records so that you could show this kilowatt hours of energy on a particular date, so we have chosen the month which immediately preceded July 1, 1957 and the month which immediately followed. Our records do show that.

Q. What quantities of electricity in kilowatt hours were supplied in these two towns by Kentucky Utilities and Powell Valley during these two months, and can you read them first separately for these two towns and then combine them?

A. In Tazewell KU delivered 118,737 in June of 1957 and——

Q. I think it makes more sense if you compare KU and Powell Valley.

A. And Powell Valley in Tazewell delivered 11,368 in Tazewell during June.

In New Tazewell during that month, KU delivered 116,645; Powell Valley delivering 3,024.

Making the total for the two towns combined, KU delivering 235,382; Powell Valley delivering 14,392, or KU Company delivered 94.2 per cent of the total kilowatt hours supplied in the two towns combined.

[fol. 581] Q. In the month of June, 1957?

A. In the month of June, 1957.

Q. Since that exhibit is going to be filed do not read the breakdown as to the different towns, but just state into the record for the month of July, 1957 the totals for the two towns combined.

A. During July, 1957 KU supplied 228,087; Powell Valley supplied 14,766, or KU supplied 93.9 per cent of the total energy used in the two towns combined.

Q. Do you have another exhibit showing the number of customers served in these two towns by Kentucky Utilities and Powell Valley on several dates in addition to the July 1, 1957 date mentioned in the TVA Act?

A. Yes, sir, I have prepared that exhibit.

Mr. Marshall: We offer that exhibit as Exhibit No. 21.

(Exhibit No. 21 was filed.)

By Mr. Marshall:

Q. We will return to that in a moment. Do you also have an exhibit of kilowatt hours of electricity supplied by KU and Powell Valley in these two towns during the months other than June and July of 1957?

A. Yes, sir. The same exhibit does include the months of June and July.

Q. But it includes additional months?

[fol. 582] A. Additional months.

Mr. Marshall: We offer that as Exhibit No. 22.

(Exhibit No. 22 was filed.)

By Mr. Marshall:

Q. Since the 1959 TVA Act refers to July 1, 1957 as the significant date for determining the area within which TVA or its distributors were the primary source of power supply, why have you prepared these Exhibits 21 and 22 showing the situation in these two towns on different dates with respect to customers served and different months with respect to kilowatt hours of electricity?

A. We prepared these exhibits to show that the situation remained much the same regarding power supply in these towns from July 1, 1957 all the way up to August 6, 1959 when the Act became effective.

The situation is shown that on July 1 of 1957, KU was serving 95.3 per cent of the customers, and the same percentage—both distributors had added customers but the same percentage remained on August 6, 1959.

The same situation is true of kilowatt hours. We had 94.2 per cent and 93.9 per cent of the kilowatt hours supplied in June and July, 1957. We still supply 94.4 per cent in August, 1959.

These further figures on these exhibits will show that the activities which began in a program which started by [fol. 583] Powell Valley acquiring other customers in areas we had normally served or acquired in some cases our own customers beginning after those dates.

Q. After the 1959 Act became effective principally?

A. Yes, sir.

Q. Do you have a map showing the electric distribution facilities of KU in these two towns as of July 1, 1957?

A. Yes, sir.

Mr. Marshall: We will offer into evidence this map showing Kentucky Utilities Company's facilities at the corporate boundary of Tazewell and New Tazewell as of July 1, 1957 as Exhibit No. 23.

(Exhibit No. 23 was filed.)

By Mr. Marshall:

Q. What is the purpose for which this map was prepared, Mr. Lewis?

A. We prepared that map to show the corporate boundaries as they existed on July 1, 1957, and to show that the distribution facilities of Kentucky Utilities Company blanketed the entire occupied areas of both towns. There are some blank spaces on the maps.

You will note that they are partially used for cemeteries. The other parts of this area were not developed, there were [fol. 584] no places in Tazewell or New Tazewell where a residence or a business could not be served from our lines, in some cases with minor extensions. We covered the entire area of the towns.

Q. On the date of this last map you are speaking of?

A. On the date of this map.

Q. Do you have another exhibit showing the location of buildings served by KU and Powell Valley within Tazewell and New Tazewell as of April 24, 1964?

A. Yes, sir, we do.

Mr. Marshall: We will offer that as Exhibit No. 24.

(Exhibit No. 24 was filed.)

Mr. Marshall: Can the Court see the maps?

The Court: I can see the map and little dots and lines. Any point important you should point them out to me.

Mr. Marshall: We will try to do that.

By Mr. Marshall:

Q. Will you describe this map, Exhibit No. 24, please?

A. Yes, sir. This map, on that map we show the corporate boundaries as the cities existed in April of 1964. I believe April 24.

[fol. 585] On it we have shown the customers we served as red dots and have shown the customers served on that date by Powell Valley or others by green dots.

Also on that map we show some red rectangles. You might point those out. The red rectangles are customers that we formally served who have been connected by others since October 30, 1963.

Q. By others now, be a little more specific. I know why you use that phrase but explain it to the Court.

A. I mean that they have been connected to the nearest points on the distribution system of Powell Valley Electric Cooperative, by contractors' men or in at least one case by Powell Valley personnel.

Q. Why is this map in terms of buildings being served?

A. In a number of cases in both towns we serve more than one customer in one building. In some cases as many as eight, some six, and so forth, and we would have been unable to show each customer in its correct location, so we showed the building.

Q. How do you define a customer, you say you may be serving six or eight customers in a building?

A. We decided a customer as separately metered and billed. For instance, if there is a building with a business downstairs and two apartments upstairs, each customer [fol. 586] being metered separately, that would be three customers in the building.

Q. What was done if Powell Valley may serve more than one customer at some of these Powell Valley locations indicated as green buildings?

A. We have examined each location indicated by a green circle on this map and it is possible we could have missed one but we find one such location.

Q. One where Powell Valley serves more than one customer in a particular building?

A. Serves more than one customer.

Q. Why was this map prepared as of April 24, 1964

rather than July 1, 1957, the date referred to in the TVA Act?

A. Well, of course, we had no access to Powell Valley records as to where their customers were on July 1, 1957. That was nearly seven years ago.

In our own case we had numerous customers in both towns that had moved from one location to another. Some houses had burned and be replaced, some houses had even been moved. We prepared it from field data that our people could go out and observe in the field.

I might mention in this exhibit I filed regarding customers on different dates, that if there is any benefit of the doubt it would be given to Powell Valley by this map, be-
[fol. 587] cause as of July 1, 1957 we served 95.3 per cent of the customers, as of May 25, 1964, a month later than this map, we were only serving 83.8 per cent. So their customers are shown in the better proportion than they would have been if we could have reproduced these customers.

Q. As of 1957?

A. Yes.

Q. You stated when you prepared this map you did not have records of the 1957 location of Powell Valley customers. Do you now have that information?

A. Yes, sir. We were given a map at the pretrial which showed Powell Valley customers as open circles in both towns. These open circles did not show up well for purposes of our comparison.

We reproduced this map that was given us by the defendants and colored each of the circles green which would also be in conformity with the colors on this map, and have shown them on the map.

Q. That is simply for the purpose of making them stand out so somebody can see where they were?

A. That is right.

Mr. Marshall: We offer this copy of the defendants' map so colored and with changes which I will note in a moment as Exhibit No. 25.

The Court: It is received.

[fol. 588] (Exhibit No. 25 was filed.)

By Mr. Marshall:

Q. Have you made any other additions or comments or notes on this map of the defendants?

A. Yes, sir. We are following the same color scheme as this map. We note in red that KU served on that date 344 customers in Tazewell and 217 in New Tazewell. We showed the combined total of each on this map.

Q. What is that combined total?

A. This combined total is 30 customers in both towns for Powell Valley, 561 served by KU, showing that we served 94.9 per cent of the total customers in the towns combined.

Q. I notice there is a slight discrepancy between the figures we have put on this map and the figures on the exhibit as to the number of customers. On the map there are 30 dots reflecting Powell Valley customers, and you have used this figure of 30 in figuring the percentage that you have noted on the map.

In the exhibit that you prepared and testified about earlier, the total of Powell Valley customers in the two towns on the same date, July 1, 1957, was shown as 28 instead of 30. Will you explain how that discrepancy arose?

A. On September 10, 1964, the parties entered into a stipulation agreeing as to the number of customers. That [fol. 589] was the latest dated information I had, and this other exhibit was prepared from the figure of 28 which was given on the stipulation.

Q. Was that figure also in the interrogatories?

A. That figure was also in the interrogatories. Since this map showed 30 customers, for the purpose of the map we used 30 customers.

Q. You testified earlier with reference to an earlier map, that KU facilities in these two towns on July 1, 1957 so blanketed the towns that any person desiring electric service could have obtained it from KU.

Could the same thing be said of Powell Valley facilities in these two towns on July 1, 1957 as shown by this copy of the defendants' map, which copy we have filed as Exhibit No. 25?

A. No, sir, and this would answer the question the Court asked a witness this morning as to how these customers got into those towns.

Q. Could you point—would the Court permit him to point out to you on the map here?

A. If you look at the concentration of Powell Valley's customers, they are in the very eastern limits or sections of Tazewell. These customers in New Tazewell are concentrated also in the eastern limits with the exception of one customer over here in the extreme western edge.

[fol. 590] Either the towns grew out to include these lines—you can see there that their facilities consist of a simple line across this area—either these towns grew out to include these customers or these were extensions from rural lines up into town. In each case these lines stopped with the customer that was served last and they did not extend on into the town, but those lines were in relatively rural areas.

Q. Why did you not add KU's customers to this map of the defendants in circles, for example, as they have shown Powell Valley's customers on this date and colored those circles red?

A. Well, sir, according to the scale of this map, if we had represented our customers or even buildings with red circles of the same size as those shown by Powell Valley, we would have simply had two red towns.

I don't believe we could have gotten that number in this area. We certainly could not have put them in their geographic location.

Q. You could not have shown individual customers by dots of this size?

A. No, sir.

Mr. Marshall: If the Court please, at this time we are going to start on a line of evidence during which we will offer in evidence a number of maps prepared and distrib-

[fol. 591] uted by TVA.

We offer those maps for the reason that as we understand the maps they are inconsistent with the position of TVA taken in this action. They are the only maps we could get. They are, in our judgment in many other respects, or in many respects, inaccurate.

And I would state further too, if it be thrown back at us that these were our exhibits and we in that manner agree as to Tazewell on the map or New Tazewell, or any other

area, have acquired the accuracy of these maps, we do not accept the accuracy. There are many areas in which we think they are not accurate but we have them for showing the inconsistency of TVA's publications with the position they have taken in this lawsuit.

By Mr. Marshall:

Q. Mr. Lewis, in this matter TVA and the other defendants take the position that, I am quoting from documents that TVA has furnished us, "All of Claiborne County, Tennessee is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Has TVA, prior to the development of this controversy regarding service to Tazewell and New Tazewell, acknowledge a contrary position in various maps or other documents which you have with you now?

[fol. 592] A. Yes, sir, in several.

Mr. Marshall: The first such map that we offer in evidence as Exhibit No. 26 is the largest scaled such map which we have been able to obtain. It is a map entitled "Tennessee Valley Authority, Office of Power, Transmission System," dated July, 1958.

Mr. McCarthy: If the Court please, we object to this map. Counsel has stated that this map contains many inaccuracies. Obviously it is a map of a transmission system, not a map to show anything with reference to this Tazewell situation, and it seems to me that counsel can't put a map in evidence and say we think this map is grossly inaccurate but that we are going to take it for one thing that it shows.

The Court: I think your objection goes to the weight of the evidence rather than the competency. I will let him introduce it for the limited purpose indicated. Whether it shows that limited purpose, I guess is a question of fact like all other questions of fact.

(Exhibit No. 26 was filed.)

By Mr. Marshall:

Q. Mr. Lewis, take a look at the legend on this map, [fol. 593] Exhibit No. 26. Counsel for TVA has just stated that the map had as its purpose, or was a map of the transmission system and was not prepared for the purpose of showing service areas or something of that sort. What is the last item in the legend printed on the map?

A. The last item is an orange block and the wording by this orange block says that any areas in orange apparently indicates service areas of cooperatives.

Q. Are you reading?

A. Service areas of cooperatives.

Q. The words quoted by the orange marks are what?

A. "Service areas of cooperatives."

Q. Now what is the next item up from the bottom on that map?

A. "Service areas of municipalities."

Q. And what is that indicated by?

A. It is a blue circle which would indicate that the blue areas are served by municipalities.

Mr. McCarthy: Are you accepting this as an accurate portrayal of those areas served by municipalities and cooperatives?

Mr. Marshall: No.

Mr. McCarthy: I continue my objection, your Honor.

The Court: I will have to hear all the proof.

[fol. 594] I will let it go in subject to your objection.

I don't know—I have no idea what it is going to show, what is going to develop from it.

By Mr. Marshall:

Q. I hand you another map very similar to the last one. This one is dated July, 1960, and bears a designation in the lower righthand corner "Map C-2" otherwise it bears the same title, "Tennessee Valley Authority, Office of Power, Transmission System."

To clear up any confusion I will ask that you read the two bottom items in the legend on this map because the wording, I think, is slightly different than on the 1958 map.

A. On this map, by the blue field, it says "Retail distri-

bution by municipalities." By the orange field it says "Retail distribution by cooperatives."

Q. I will ask if these two maps, the 1958 and the 1960 map are substantially the same with respect to what they show accurate or not around the area of North Claiborne County? Would you just compare them there?

A. Yes, sir, they are substantially the same.

Mr. Marshall: Now would the Court accept for reference one of these to look at as he testifies.

The Court: Is he going to continue to testify about these two?

[fol. 595] Mr. Marshall: Yes.

The Court: I can follow it better by looking with him and watching it. My eyes are better than my hands.

By Mr. Marshall:

Q. Now in light of the legend on this map—we are referring to the July, 1958 map, orange indicating service areas of cooperatives, blue indicating service areas of municipalities,—does this map indicate that all of Claiborne County is within the service area of TVA or any TVA distributor, cooperative or municipality?

A. No, sir, it does not. There is a white wedge that comes down into the area served by Lafollette. Claiborne County is continuous with our service area around Middlesboro and Bell County.

Q. Just stop a moment and state to the Court what Lafollette is?

A. It is the Lafollette Electric Department which is operated by—it is a municipal operation by the City of Lafollette which distributes TVA power.

Then coming in a southeasterly direction from Middlesboro is a sort of corridor which comes down past this area of Lafollette and runs 13 to 14 miles, according to the scale on this map, down into Claiborne County. It runs to a point about two miles south of Tazewell, this wide corridor.

[fol. 596] Q. Look closely and state to the Court whether the Town of Tazewell is identified on the map?

A. Yes, sir, it is identified here.

Q. Is the dot on the map representing Tazewell within the corridor of white or is it within the orange of Powell Valley's service area?

A. The dot representing Tazewell is within the white corridor which is a continuous corridor from our service area in Middlesboro. It is not in orange.

Q. Mr. McCarthy has asked if we are offering this map and if we are accepting it as being accurate in all respects. Does this map show the Town of New Tazewell?

A. Yes, sir, it does. Here is New Tazewell.

Q. Does this map show New Tazewell as being within the service area of Powell Valley according to the legend?

A. Yes, sir, it does, and it has been in our service area as long as Tazewell has.

Q. That is one respect in which we do not accept this map as accurate?

A. One respect to which it is inaccurate.

Q. It has already been testified, I believe, and if not I will ask you if it is correct, that at the time these maps were prepared in 1958 and 1960 if KU had a 34.5 KV trans-
[fol. 597] mission line extending down from Cumberland Gap, well, actually extending down from its KU service area up in Bell County and then Cumberland Gap and down through this white corridor to Tazewell?

A. Yes, sir, at that time we had such a line. It is not shown on this map although it is shown as a green line on this 1960 map.

Q. Will you look again at the legend on those maps and state to the Court how transmission lines of private utilities are described on these maps?

A. Yes, sir. Transmission lines of private utilities are described as a green line, and they are shown in many instances around on the map.

In this case here is one of our own transmission lines across this area served by Warren County RECC that is shown in green.

Q. In other words, could it be argued that this—I am speaking now with reference to the map legend, can you not read the map that this white corridor extending down into the Powell Valley orange area could represent that transmission line; is that what that corridor is for according to the map legend?

[fol. 598] Mr. McCarthy: We object to the question.

Q. (Continuing) Can the map be read that way, according to the legend?

Mr. McCarthy: We object to that question.

The Court: I think the objection is sustained. He can state what in his opinion the map shows. If there is an ambiguity on the map or something of that kind, he can state what it shows, in his opinion.

By Mr. Marshall:

Q. How is the transmission line of Kentucky Utilities passing from Jonesville through South Carrollton through the orange service area of Warren County RECC, how is that transmission of KU shown on the 1960 map?

A. It is shown as a green line and it is not surrounded by any white area, as are several of the green lines of several other companies.

Q. Wait a minute. Do you mean they are surrounded by white?

A. They are not surrounded by a white area. The green line is printed directly on the orange area of Warren County RECC.

Q. Not surrounded by any white corridor as the map shows down to Tazewell?

A. No.

Q. I notice other white areas on this map which are used [fol. 599] to separate a service area of different distributors, some municipal and some cooperative. Do you see those areas?

A. Yes, sir. They appear between the service areas of two adjoining distributors.

Q. Now state to the Court how this white area extending from Bell County on down past Tazewell in Claiborne differs from these white areas separating service areas of different distributors?

A. This area extending southeast from Middlesboro to Tazewell is a white corridor or white area which passes the service area of Lafollette, then it extends—in fact, this wedge is wholly surrounded by the service area of Lafollette.

Q. You say wholly surrounded?

A. On three sides, excuse me. Surrounded on three sides, to the south, east and west.

This corridor extends approximately ten miles into the service area of Powell Valley and it is surrounded on three sides by the service area of Powell Valley. It is obviously not—to me, it is not a white marking similar to these as there would be no point in separating property served by Powell Valley from Powell Valley unless someone had a service area in that white section.

Mr. Marshall: If the Court please, it has been testified in deposition by TVA representatives that TVA has not made [fol. 600] any effort over-all to prepare maps defining its service area. For whatever these maps show they may be the only thing we will have from TVA for some time.

It has been testified that in this area they are the same. I think we have to offer the 1958 map in evidence to make the record, but I will do so with a statement that we consider it an important part of Kentucky Utilities property and at some time will ask leave to withdraw it as a permanent part of the record, but we do offer the 1958 map and ask to keep this one for the reason that we tried to get others but we can't.

Mr. McCarthy: Same objection, your Honor.

The Court: Now one of them is a duplicate of the other?

Mr. Marshall: Not entirely in other areas. There are differences in the maps.

The Court: One is dated 1958 and——

The Witness: One is dated 1960.

The Court: Since you have examined him extensively about both, if he insists on both of them going into the record the Court would have to hold that they go in.

If he will agree that one may be withdrawn, I will agree [fol. 601] that you can offer one without the other, then it will be agreeable with the Court.

What about that, Mr. McCarthy?

Mr. McCarthy: We have no objection.

The Court: Let it go in that way. You can take out the one, the 1960.

Mr. Marshall: I am following the 1958 map because it is closer to the date of the Act.

The Court: Without objection you may do that.

Mr. Marshall: The July, 1958 map then becomes Exhibit No. 26.

The Court: All right.

(Substitution of Exhibit No. 26.)

By Mr. Marshall:

Q. Mr. Lewis, are you familiar with a series of annual reports of TVA distributors prepared and published by TVA?

A. Yes, sir, I am.

Q. Do you have with you a set of these reports for years beginning with 1956 and extending through 1963?

A. We do.

Q. Do each of these reports contain a map?

A. Yes, sir. Each book contains a map of the same appearance.

Mr. Marshall: If the Court please, we have, in order to [fol. 602] keep the record from becoming too bulky, removed from a copy of the 1956 through 1963 reports by TVA each of these maps. These are not copies which we have made; they are copies removed from the books. We can offer the entire report but the only thing of interest to us is the maps.

The Court: Without objection you may introduce them now.

Mr. Marshall: We then offer as Exhibit No. 27 the map from the June, 1956 such report.

(Exhibit No. 27 was filed.)

Mr. Marshall: Each of these maps—I referred in the last statement to the June, 1956 report—each of these maps is dated either June or July of the year of the report from which it came. It is actually the June—the map is dated June, 1956.

Exhibit No. 28 is the June, 1957 map.

Exhibit No. 29 is the map dated July, 1958.

Exhibit 30 is the map dated July, 1959.

Exhibit 31 is a map dated July, 1960.

Exhibit 32 is a map dated July, 1961.

Exhibit 33 is a map dated July, 1962.

Exhibit 34, a map dated July, 1963.

Mr. McCarthy: Are these all being offered by the same notation, that they are all grossly inaccurate?

[fol. 603] Mr. Marshall: I don't remember using the word "grossly" but they are all offered with the statement that we do not accept their accuracy.

Mr. McCarthy: Our objection goes to all of these.

The Court: Same ruling.

(Exhibit No. 28 through 34 were filed.)

By Mr. Marshall:

Q. Mr. Lewis, what do these eight maps prepared and distributed by TVA in these reports of its power distributors show with respect to Claiborne County?

A. These maps, although they are to a much smaller scale and they are a little harder to see, they show the same picture, that there is a wedge of white extending from our area south of Middlesboro, and it is a corridor which extends from Middlesboro south, to an area about where Tazewell would be.

The Court: Repeat what you said to me, starting at the first.

A. (Continuing) Judge, this area here shows a white area below our service area in Middlesboro in Bell County, Kentucky, and then it shows that corridor which extends down and runs into a white field which has been provided to print the name Powell Valley, but you can see the tip of that corridor extending on past that white field.

[fol. 604] The Court: What does that represent?

A. (Continuing) That represents our service area as shown into the service area of Powell Valley Electric Cooperative. It is not a white line which would separate one distributor from another and it is about the shape of our service area.

And you can see on the large map it is plain, and on this one you can see the white end of this corridor sticking past this white field.

The Court: All right, what is the next thing you said?

A. (Continuing) It shows that all of Claiborne County

here in the area served by Lafollette nor in the area served by Powell Valley is the service area of a TVA distributor.

Q: Is or is not?

A. It shows that all of it is not TVA service area.

Q. Mr. Lewis, do these maps all contain legends like the big map showing that the service area of TVA cooperatives is shown in green on the map?

A. They do, and the service areas of municipalities are shown in this tan color, in this particular one I am looking at.

Q. And then as you have shown the Claiborne County [fol. 605] there is white, out of the blue, or—I beg your pardon, tan of the Lafollette service area and green of Powell Valley service area?

A. Yes, sir.

The Court: You say the white represents that the TVA does not serve those localities?

The Witness: Yes, sir, since they state that the service areas of the municipalities is shown by the tan and the service area of cooperatives is shown by the green, and this is not. This white area which we serve is not colored tan and this one is not colored green, and I say that white indicates our service area.

The Court: Well, that is by process of elimination, is that how you reach that conclusion?

The Witness: Just by the white is shown there where an area that we serve, and I could think of no other reason for not covering that tan or green.

The Court: Is there any legend on the map showing that the KU serves, any legend indicating what you have said that the white represents the area served by KU?

The Witness: No, sir. There is none for any of the surrounding utilities. These areas are generally left white.

[fol. 606] By Mr. Marshall:

Q. Point out to the Court, if you will, it is covered up with names quite a bit, the situation around Kingsport, Tennessee, how is that shown?

A. The situation around Kingsport is this. It is shown as a white area which is continuous from Virginia. This is served by Kingsport Power Company, which is a wholly

owned subsidiary of American Electric Power Company, and it is shown white down into here. It is shown white for a considerable way. That shows much better on a larger map.

Q. Point that same situation out to the Court with respect to Kingsport on the July, 1958 larger scaled map there.

A. Here is Kingsport, and it shows this white area down into this county—Sullivan County, right here, and it shows it coming into the area of Holston—would be an electric cooperative, in this Bristol and Johnson City municipal system. That is, it is cut into this area which area is service area of Kingsport Power Company, and we think that is the same situation as is shown here.

The Court: I see. Now, Mr. Marshall, so as I can understand, remember this is the first time I have seen these maps. You men have grown up with the case and you know much more about it than the Court.

[fol. 607] It is the contention that all these maps that you have introduced, recently introduced and which were prepared by TVA, show that the Tazewell—the two Tazewells, were served by your company, Kentucky Utilities; is that the idea?

Mr. Marshall: Except that I cannot go that far on the two Tazewells. These maps show that I have introduced so far, prepared by the TVA, show New Tazewell as being in the Powell Valley service area on these maps.

It is our position that these maps constitute an acknowledgment by TVA that our service area runs down to and includes Tazewell as clearly shown on this map, that white service area leading on down and including Tazewell, is just the same as the one over including Kingsport, just the same as the one on the other side of the map including Memphis, the same as the corridor running up and picking up other towns.

It is our position that that white is a clear acknowledgment of TVA in its own map that that corridor down through there is our service area.

I think we will strengthen that contention as to what that corridor constitutes.

The Court: But the maps don't show that New Tazewell is a service area of KU.

[fol. 608] Mr. Marshall: The ones we have introduced to this point prepared by the TVA, do not show New Tazewell as a KU service area, that is correct.

It is our position that to that extent they are inaccurate, they just were not in that detail, but they do show this much of the position which we take and contrary to the position which TVA takes with respect to that entire corridor down through there.

The Court: All right.

Mr. Marshall: I would like to offer one more such map.

Mr. Rowntree: If your Honor please, I think we ought to clarify our position to this extent. That we don't think the TVA has the power to determine where their service area is under this statute, but we are introducing these maps as admissions against interest—admissions against interest contrary to other testimony which they will probably put on.

The Court: All right.

Mr. Marshall: We offer as Exhibit No. 35 a map prepared on a slightly different basis, Tennessee Valley Authority transmission system, dated July, 1962, designated in the lower righthand corner as map S-2.

(Exhibit No. 35 was filed.)

[fol. 609] By Mr. Marshall:

Q. On this map I believe it is correct that there are no broad colored areas such as there has been on the previous maps; is that correct?

A. That is right. This map shows the same thing we have just discussed except that it does not color the areas. It shows their outline with a colored line.

The Court: What is the date of this map?

The Witness: July, 1962.

A. (Continuing) It again shows this wedge. In this case it is shown clearly by the line. It shows the wedge going into the service area of the Lafollette system and its corridor going into the area served by Powell Valley.

The Court: Where is the corridor you are talking about?

The Witness: (Indicating on map for the Court.)

By Mr. Marshall:

Q. Is Tazewell identified on that map?

A. Yes, sir, Tazewell is identified by this circle.

Q. Is there any line across the top of that corridor which would include that area as the map maker would indicate within any TVA service area or is that corridor open from Kentucky clear down past Tazewell?

[fol. 610] A. That corridor is open and that line rather goes around in the complete circle to enclose the service area of Powell Valley. It leaves out this corridor.

Q. Now do you have one more map prepared by TVA?

A. Yes, sir, I have one other map.

Q. I will show you the original of a letter from Mr. Merrill DeMerit, chief power engineer of TVA, dated June 18, 1952, addressed to Mr. N. P. Taylor, chief power engineer, Kentucky Utilities Company, and a map attached to that letter, and we will offer as a single exhibit this letter from Mr. DeMerit with a map attached to it because the map came with the letter.

I will ask that you read to the Court the letter from Mr. DeMerit of the TVA to Mr. Taylor of Kentucky Utilities.

A. Without reading the date or address, the text of this letter is:

"I am attaching map made up of our LC-7000 series of distribution maps showing the areas now served by the Lafollette Electric Department, the Powell Valley Electric Cooperative, and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee.

"These maps are easy for us to reproduce if it becomes necessary to have copies made. Very truly yours, Tennessee Valley Authority, Merrill DeMerit."

[fol. 611] Mr. McCarthy: If the Court please, we object to this letter and this map on the ground that it is too remote in time. This is 1952, five years before any conceivably relevant date.

The Court: Well, again, I think the objection goes to the weight rather than the competency, and I overrule it.

Mr. McCarthy: I have a copy of that.

By Mr. Marshall:

Q. The Court has noted that some of the other TVA maps which we have filed do not acknowledge that New Tazewell is in our service area. Is this map furnished by Mr. DeMerit of the TVA on a much larger scale than these other maps we have offered?

A. Yes, sir, it is on a larger scale and in considerably more detail. It is expanded up here to show that we serve Arthur, which is correct, and it turns to the southwest below Tazewell and does include this area of New Tazewell, and down here to a location where we once served a zinc mine.

The Court: Are you referring to the same map as this?

The Witness: Yes, sir. This is a reproduction of this map, and Mr. DeMerit had marked this in red, and this is the only copy we have in our records.

[fol. 612] We had these reproduced and, of course, this is the outline shown by Mr. DeMerit on his original map in red.

And this, I might say that this map was drawn expressly for the purpose of showing the service area, just as he stated in his letter. It was drawn for the purpose of showing that the service area in the Cumberland Gap-Tazewell area, whereas the other maps there indicate that some part of northern Claiborne County was out of our area but this was drawn by TVA to show this particular area to a much better scale.

By Mr. Marshall:

Q. And at the end of the corridor as shown on those other maps, this more detailed map bends the corridor around?

A. It bends the corridor around and to the southwest and includes New Tazewell.

The Court: Tazewell or——

The Witness: Here is New Tazewell.

The Court: Where is the corridor?

Mr. Marshall: Stand up there so the Court can see it on that map.

The Witness: This corridor is extended down. It was shown roughly on these smaller scale maps as being a straight line, but actually it extends down to here and [fol. 613] bends and comes over to include New Tazewell and goes on south of there.

The Court: All right.

Mr. Marshall: We will offer a copy of the letter and the map dated June 18, 1952. The letter is dated June 18, 1952. That will be Exhibit No. 36.

(Exhibit No. 36 was filed.)

By Mr. Marshall:

Q. Mr. Lewis, how does Mr. DeMerit's map that you have just been talking about showing KU service area in Claiborne County and so identifying it as Kentucky Utilites, how does that map show Kentucky Utilities service area in Claiborne County compared to the 1958 maps prepared jointly by KU and Powell Valley which were testified to this morning and introduced?

A. This map compares rather closely with the map prepared in connection with the 1958 agreement.

Of course, you must remember that map was prepared by men who had these geological survey maps which showed individual customers' houses and rivers and creeks and streams.

Q. You are talking now about 1958 map which shows individual houses?

A. Yes, and it was drawn to a much larger scale, therefore it would have—there were some slight differences be- [fol. 614] tween the Mr. DeMerit map and this map that Kentucky Utilities developed with Powell Valley. However, both are in the same general shape and follow each other closely considering the difference in scale of the maps.

There is an additional point I have not mentioned. At one point at least, where the lines of Powell Valley and KU crossed, it was necessary——

Q. Wait a minute. I think this is significant and the Court would like to see it.

A. As you can see this map is to a much larger scale and does show straight lines.

The Court: Are you talking about Exhibit 14?

A. (Continuing) Talking about Exhibit 14. It is to a larger scale than Mr. DeMerit's map which has just been filed as Exhibit No. 36, and it does have a little sharper definition of this area, but in the main it is the same shaped area that we have arrived at here with the exception of at least one point where the service lines of the two distributors are crossed, and we had to reach some agreement between the parties as to who would serve those areas in the future and that agreement was resolved by necking that one section in. Their service lines cross ours at that point.

The Court: What do you mean by "necking"?

The Witness: Where the shaded area indicated for KU [fol. 615] service area comes to a point and then widens back out and comes on south. Their lines cross ours at that point and instead of staying out where our customers were we reached an agreement among Mr. Rowe and Mr. Osborne then as to who should logically serve that area, and in our Exhibit 14 the area does come into a point and then widens back out.

Whereas, in the Mr. DeMerit map he just shows where the customers were.

Mr. McCarthy: I want to make a further objection, your Honor, to this, Exhibit No. 36.

We served interrogatories on the plaintiff in this case and we asked them in Interrogatory 20 to list their drawings by date and other indicia sufficient for the complete identification thereof, all, maps, charts, drawings or other documents which would show the location of electric customers of plaintiff within Claiborne County, Tennessee as of July 1, 1957, August 6, 1959 and November 7, 1963. That probably does not cover this, but we also asked them in Interrogatory No. 24 to list and describe every document including all correspondence, maps, charts, photographs, et cetera, which you now reasonably anticipate that you may rely upon in any manner at the trial of this cause, and [fol. 616] state the name and address of the person who has custody of such object.

The Court: All right, Mr. Marshall.

Mr. Marshall: This map was found back in KU's files long after we answered those interrogatories, at a time when we did not have them in mind. This is a map prepared

by the TVA. I assume it has copies and access to it. The map was found about, I would say, two weeks ago when Mr. Duncan was in the files to get background information and the letter addressed to Mr. Taylor who had been dead ten years, we did not know signed it, and it was very material, and we ask it be considered.

Mr. McCarthy: With all deference to counsel, I believe there was an obligation to notify us that they intended to rely on it and they would introduce it.

Mr. Marshall: I believe an objection I made to your interrogatory has been sustained.

The Court: I sustained 23 and 24.

Mr. McCarthy: That is 24. I am sorry, I did not realize that had been sustained.

The Court: All right.

Mr. McCarthy: Your Honor, to get back to 20.

"In the event plaintiff does not have documents which [fol. 617] would furnish the information requested as of the date indicated, give the requested information as of such date nearest thereto for which the information is available, and as to each document give the name and address of the present custodian thereof."

Our objection to No. 24 has been overruled but we want at this time to make an objection on both of these interrogatories.

The Court: What do you say to his objection based on Interrogatory 20? The objection based on 24 is out because the Court ruled on that.

Mr. Marshall: Interrogatory No. 20 asked for maps, and so forth, indicating the location of electric customers—only broadly would that take in a service area map—of plaintiff within Claiborne County, Tennessee, as of the 3rd day of July, 1957, August, 1959 and November, 1963.

Nothing about customers on that map. It is a service area map.

We gave him in answer to that the roll maps of which we knew at that time which do show customers and a map which we had prepared showing customers, and I don't think the interrogatory calls for this.

As I say, this was found months after this and it is very material.

[fol. 618] The Court: Well, the objection is overruled. Go ahead.

By Mr. Marshall:

Q. Mr. Lewis, it is the position of TVA in this case that county boundary lines have some significance. I won't undertake to state what because I am not sure I know, but some significance with respect to service areas.

Now I would like you to look again at the July, 1958 large scaled map, Exhibit No. 26, and just confine your testimony to the part of the map extending from a point slightly west of the Jellico distribution area to the point east, say, of the Bristol, Virginia area.

How many points on there can you count where the service area of a TVA distributor as claimed by this map differs from the county line and the Tennessee-Kentucky or Tennessee-Virginia state line? Just go from west to east.

A. Of course, at the state line the county line would be the same.

Q. As the state line.

A. As the state line. I see at least five cases on this one section. The Jellico system extends up into Whitley County, Kentucky, does not take all of Whitley County, Kentucky, goes up to a point south of Williamsburg.

Williamsburg is served by Kentucky Utilities Company.

[fol. 619] In the case we are now discussing there is a white area which goes in the opposite direction that to me indicates that is a private utilities area into an area served by TVA distributors. And here is one that crosses the state line.

The area of Powell Valley is shown to extend up and include—apparently it is shown to include all of Lee County and one tip of Scott County.

Q. There you have got back north of the Tennessee state line?

A. Back north of the Tennessee state line, and it does not occupy all of Scott County.

In the Kingsport area, for instance, the property of Kingsport Power Company, which we mentioned earlier, that white area, extends south of the line into the area served by TVA distributors. The white area is shown to exclude an area which is part of Sullivan County.

Q. Part of Hawkins?

A. And part of Hawkins. And here at Bristol, Virginia, going back again the other way, the area of Bristol, Virginia, extends north into Virginia, into Washington County, and a little wedge of Scott County.

There are five cases, three where TVA distributors' area goes north of the state line, to where the white areas go south of the state line and no case is the state line observed [fol. 620] there and in only one case does it show an entire county colored.

Q. Is that in fact accurate about Lee County or is Old Dominion——

A. That is inaccurate. Along U. S. Highway 58, Old Dominion Power Company serves a number of small towns, three incorporated towns in particular. Pennington Gap, Jonesville, St. Charles.

We have several customers in this area which is shown solidly colored as the area of Powell Valley.

Q. But in these other instances the service area line as claimed on this map is not the same as the county line?

A. No, it does not follow county lines or state lines.

The Court: What is the purpose of that testimony, Mr. Marshall?

Mr. Marshall: As I understand the position of the defendants, they say that because they served most of Claiborne County they ought to be able to serve all of Claiborne County and they submit the county line is the boundary. I don't know the significance of the county line.

There is nothing in the statute about it. If they can go to the county line then they may say they can go to the state [fol. 621] line. I don't know why they couldn't come down across into Bell County.

They have asked in interrogatories and made argument about the service of all of their distributors in Claiborne County as against our service in Claiborne County, suggesting that their position is that if they served some fraction over 50 per cent they could go then to the county line.

The purpose of the testimony was to show that in utility operation county lines are not generally natural boundaries, and we pick that to show that it is on both sides of the one

where we are talking about here, where TVA does not claim a county boundary is the service area boundary.

Mr. McCarthy: That is not our position, if the Court please. Our position is not that you go by county lines or by state lines.

We certainly do not contend that just because 51 per cent of the power in the county happens to be TVA power, that the whole county is within the area to which TVA was the primary source of power supply on July 1, 1957.

What we do say is that the location of the county and state lines is a relevant factor. It is one of the many factors which the TVA Board has a right to take into con- [fol. 622] sideration in fixing the line that borders the area of primary service, and where you had just a very small amount of service by a private utility within a county, a small amount of scattered service, that would be a factor to be considered.

That is our position.

The Court: All right.

By Mr. Marshall:

Q. Mr. Lewis, Mr. McCarthy in his statement referred to scattered service. Reference has been made throughout the testimony to a corridor of KU service extending down past Tazewell on the maps; reference has been made to the fact that KU has a 69 KV transmission line extending down that corridor.

Does Kentucky Utilities have other facilities in this corridor extending down from Bell County to and including Cumberland Gap, Harrogate, Arthur, somewhat to the west and on down to Tazewell and bending on west to New Tazewell?

A. Yes, sir. We have approximately 90 to 100 miles of distribution lines in that corridor and we serve quite a few customers in the corridor before and after we get to Tazewell and New Tazewell.

Q. Have you prepared a map entitled Electrical Facili- [fol. 623] ties in Claiborne County, Tennessee, dated January 1, 1956 as as exhibit in the case?

A. I have prepared such a map.

Q. This map was not prepared just for this case, was it?

A. No, sir. This map was prepared originially in 1956 to

show our facilities in Claiborne County and it was revised in September, I believed, of 1959.

Q. In other words, this map was part of the company's files, I take it?

A. Yes, sir.

Mr. Marshall. We have repeatedly stated the company's position in this case, if the Court please, that we are trying a lawsuit over Tazewell and New Tazewell, service to these. Our position, however, as Mr. McCarthy has argued before the Court in his pre-trial, it is TVA's position that the Tazewell and New Tazewell somehow constitute islands entirely surrounded by TVA power.

We will have a line of testimony later on. We don't think that would be significant if those two towns were islands, but it is our opinion that factually that is not correct anyway. Without waiving our position that Tazewell and New Tazewell is what we are trying, we want to prove the situation down that corridor.

[fol. 624] We will file this facilities map dated January 1, 1956 as Exhibit No. 37.

(Exhibit No. 37 was filed.)

By Mr. Marshall:

Q. The map shows a revision date of 1959, I believe?

A. Yes, sir. I have pointed out, this map was drawn January 1, 1956 and it was revised on September 1, 1959 in order that we might show what was present in this area in the way of lines as of July 1, 1957. We have drawn circles around these particular revisions so that the map essentially shows what we had on July 1, 1957.

This heavy line which comes from the Cumberland Gap substation, the solid line rather, to Tazewell is our transmission line.

The brown lines indicate our 12 KV distribution lines which go out in this corridor we have referred to and serve customers.

There are several buildings, a substation at Cumberland Gap, and from this substation you have been discussing at Tazewell, to feed up and down, roughly, the Powell River, but this corridor is full of our facilities and we have 12 KV distribution lines, and it comes on south, bends to

the southwest at Tazewell and includes Tazewell and some [fol. 625] width to it, and it comes on down to this point.

Q. On July 1, 1957 how many customers did KU serve in Claiborne County outside Tazewell and New Tazewell?

A. Accourding to our records 1,278.

Q. Will you show to the Court by reference to that map where those customers were served?

The Court: Read that question and answer.

(The last question and answer were read by the reporter.)

By Mr. Marshall:

Q. Show the Court where those customers were served just by reference there?

A. They were served along this corridor. Served in Cumberland Gap and Harrogate, around LMU, at Shawanee, around the rural lines and small towns all completely down this corridor.

Of course, this would be the corporate boundaries shown here of Tazewell and New Tazewell. We have a line that comes on south of this here. This line serves approximately 34 customers. I think residential customers.

Q. And you have an area over here around Bryson where you served?

A. Yes, we do have an area around Bryson. We have a 33 KV transmission line that comes down from Bell County and serves our Bryson Mountain service station and our [fol. 626] Yellow Creek service station, and there was some testimony this morning of approximately 50 customers in that area. This is an area other than this corridor.

Q. Mr. Lewis, is the company's service area up and down this corridor isolated from the service area in Bell County, Kentucky or is it a continuation of that Kentucky service area?

A. It is a continuation of the service area in Bell County, continues down through the width of this, what we have described as a corridor, and includes Tazewell and New Tazewell and goes on south of there.

Q. Is the service down the corridor into Tennessee in any way cut off from the service area in Bell County, Kentucky

by any facilities or service of any TVA distributor at or near, say, the Tennessee state line?

A. No, sir.

Q. The defendants have furnished us a copy of a large map entitled "Customers and Lines of TVA Power Distributors as of July 1, 1957 in Claiborne County, Tennessee."

Judge, I know you can't see this from that distance and yet it is so big I don't know what else to do with it. Maybe we can fold part of it.

Mr. Lewis, have you added to the map of the defendants the facilities of Kentucky Utilities in this same corridor you have been talking about in Claiborne County as of the date [fol. 627] of the map, July 1, 1959?

A. Yes, sir. We added our facilities in red.

When we received a copy of this map it showed the distribution facilities of Lafollette system and Powell Valley system. If you knew where the corridor was you could see that that was empty but unless we added on these red facilities of ours it did not show up, so we took the occasion to show our transmission lines with a solid red line in this map. Our distribution facilities which were tan in this map are shown on this map in red, and obviously they do cross at one point. This is the point where we referred to awhile ago. But all this area there that had no lines shown on it does have facilities in the area. The black ones are TVA distributors; red ones are ours.

This map was prepared by them showing the corporate boundaries of the two towns.

Q. And the sole purpose of this map is to show the location of our facilities on the same map where they have their facilities?

A. Right.

Mr. Marshall: And I might call attention, there is no effort to suggest by the width of our lines that ours are any bigger or better, but we just put them on there so you could see the location.

We offer that as Exhibit No. 38.

[fol. 628] (Exhibit No. 38 was filed.)

The Court: Let's take a recess, gentlemen.

(A short recess was had.)

The Court: Gentlemen, will counsel come to the Bench a minute, please.

(A discussion was had at the Bench between the Court and counsel.)

By Mr. Marshall:

Q. Mr. Lewis, you have described a corridor of KU facilities and service extending down past Tazewell. Does KU have a franchise relating expressly to that corridor, and I hand you what has already been filed as Exhibit No. 3 and I ask you to read the grant language of that franchise where it says "is granted the right" and it picks up and says what the franchise is, right there.

A. ". . . the right to construct and perpetually operate and maintain electric transmission and distribution lines over, along and across county highways between Cumberland Gap and New Tazewell."

That was on July, 1952 franchise granted by the Quarterly County Court.

Q. Is that franchise still in effect?

A. Yes, sir.

Q. Now are the highways which run between Cumberland Gap and New Tazewell, are they the area, are those [fol. 629] highways with which your facilities and service runs up and down this corridor?

A. It represents the same corridor we have discussed and as our lines it goes down to Tazewell and bends to the southwest and includes New Tazewell.

Q. The franchise refers to a highway between Cumberland Gap and New Tazewell. Does that highway go down southeast to Tazewell and then bends southwest to New Tazewell?

A. Yes, sir.

Q. Once again, it is TVA's position in the case that if a town served by a private utility is entirely surrounded by TVA service so as to constitute an island, that that means that it is within TVA service area and is eligible for TVA service.

Have you an exhibit containing at least a partial list of

towns which are now served by investor-owned electric utilities which towns are completely surrounded by TVA power service area at least as such area is shown on TVA's July, 1958 transmission system map in evidence as Exhibit No. 26?

A. Yes, sir, I have such a list prepared.

(Exhibit No. 39 was filed.)

A. (Continuing) This list is obviously a partial list of the towns that are completely surrounded. It includes nine [fol. 630] towns served by Georgia Power Company, 24 towns served by Kentucky Utilities Company, 25 towns served by Mississippi Power & Light Company or Mississippi Power Company, 13 towns served by Old Dominion Power Company, and one town served by Kingsport Power Company.

Q. On this Exhibit No. 39 the town and state are identified, the private power company which supplies it is identified in each instance, and then in a third column it specifies whether the supply is at wholesale or retail, and the population figures are in the fourth column.

Do you have an adding machine tape on the population figures on that exhibit?

A. Yes, sir, I do.

Q. What is the total population of those towns in this category, that is, that they are completely surrounded by TVA's claimed service area?

A. 84,340 people.

Q. In addition to this island argument of TVA, it makes a further argument through its counsel that areas that are somehow within a broad perimeter can be cut off and taken by TVA. I don't know any way we can draw a line as to what we are going to consider a perimeter, but with reference to the July, 1958 map—could the Court note this—will you explain, starting with Tazewell and New Tazewell here, for example, and as we understand TVA's position [fol. 631] the perimeter argument would entitle TVA to somehow cut across service areas that are within a broad outline of its service area and take what is within that cut-off area.

Point out to the Court if you will by referring to your

map some other areas where that cut-off or perimeter argument might be applied if it has any validity.

A. It is hard to determine exactly what they mean but here, for instance, is a definite corridor which they might draw a line from here to make this a contiguous area or perimeter.

Whether or not they could draw a line from here to here, or from here across this corridor, from here to here, they might draw one here which would include Birmingham, or they may draw, for instance, from this point to here, or they may only make it include these.

Q. How about Kingsport, that is an obvious illustration?

A. Kingsport would—a line could be drawn across here which would include Kingsport. It could, conceivably, if you tried to make an even periphery, be drawn across this area, which would include more of Scott County.

I don't know where the point of tangency would be or what they shape they are implying shuold be arrived at.

Q. Obviously since it is impossible to define how broad [fol. 632] an area might be cut off by any of these tangents or any of these so-called straightened out perimeters we don't know how far they intend to go, have you compiled a second necessarily partial list of towns which are presently supplied by investor-owned electric utilities which towns lie within areas which are partially but not entirely surrounded by TVA's power service area as that service area is claimed on this July, 1958 map?

A. Yes, sir, we have, and it was done by drawing a line across these obviously small corridors, such as this one or this one across here.

We did not attempt to take in these wide areas, and therefore it must be a partial list because I did not know where we should draw these tangent lines.

Q. Just point out to the Court if you will some of those so he can see this perimeter argument developed on the map.

A. There are 37 served by Alabama Power Company. I think we included Norton. Some of these towns, incidentally, did not appear on this map. We drew this—Mr. Buchanon prepared this, drew this line across. Here is Gadsden.

Q. Here is Kingsport again?

A. Yes, sir, and Kingsport. Gadsden would certainly have been in his perimeter area.

There are four towns served by Georgia Power Com-
[fol. 633] pany, three served by Mississippi Power or Mississippi Power & Light, Kingsport Power had eight towns and we had one.

Q. Here is one up this corridor.

A. Yes.

Q. If they are entitled to straighten out that perimeter corridor like this, at least these towns which are now served by investor-owned utilities would become subject to TVA power?

A. This would be in the corridor, yes.

Mr. Marshall: We offer that as Exhibit No. 40.

(Exhibit No. 40 was filed.)

By Mr. Marshall:

Q. Do you know what the population is of the towns on Exhibit No. 40?

A. Yes. The population of the combined towns is 115,287 people.

Q. Now again I hate to keep troubling the Court, but if you could refer to this map one more time, Mr. Lewis. There are certain towns mentioned in the 1959 TVA Act. I would like to read the language for the moment. After containing the language restricting TVA, the statute then provides, "Nothing in this sub-section shall prevent the corporation"—TVA—"when economically feasible from making exchange power arrangements with other power generating organizations" and so forth.

[fol. 634] Now this is the language, "prevent the corporation from continuing to supply power to Dyersburg, Tennessee"—point out to the Court Dyersburg, Tennessee.

A. Here (indicating).

Q. The map shows it there. In this 1958 TVA map is Dyersburg, Tennessee shown to be completely surrounded by the TVA power service area?

A. Yes, sir.

Q. The next town, "or Covington, Tennessee."

A. Here (indicating).

Q. Completely surrounded on the map by the TVA power?

A. Yes, sir.

Q. "or from entering into contracts to supply, or from supplying power, to the cities of Paducah, Kentucky, Princeton, Kentucky, Glassgow, Kentucky."

Is Glassgow surrounded on three sides by TVA power?

A. Yes.

Q. So that if a corridor such as that could be cut off with a perimeter Claiborne County would be within that kind of corridor?

A. Yes, sir.

Q. "Fulton, Kentucky"—is Fulton, Kentucky shown to [fol. 635] be completely surrounded by TVA power?

A. It appears to be. It is possibly not on one side where it appears——

Q. You are looking at Hickman. Fulton is over here.

A. Fulton is completely surrounded by TVA.

Q. According to the map?

A. According to the map.

Q. "Monticello, Kentucky," which I believe is not surrounded. "Hickman, Kentucky."

A. Hickman, Kentucky is here, apparently surrounded except possibly on the northeast side at the river.

Q. "Chickamauga, Georgia."

A. Georgia. Here is Ringgold.

Q. Ringgold is in the list. Is Ringgold completely surrounded by TVA power?

A. Ringgold is completely surrounded.

Q. Is Chickamauga completely surrounded by TVA on the map?

A. Chickamauga is completely surrounded by TVA on the map.

Q. "Oak Ridge, Tennessee."

A. Oak Ridge, Tennessee is completely surrounded. It is shown as a white area on this particular map.

[fol. 636] Q. Completely surrounded by TVA?

A. Completely surrounded by TVA.

Q. And South Fulton, Tennessee?

A. And South Fulton, Tennessee, is here, again. It is completely surrounded.

Q. Mr. Lewis, it was developed in cross examination this morning that Kentucky Utilities——

The Court: Have you finished with the map, Mr. Marshall?

Mr. Marshall: Yes, sir.

The Court: I would like to ask a question.

If the Court is required to set up an area which may be served by the private utility alone in accordance with the 1959 Congressional Act, since the proof shows that old Tazewell and New Tazewell were being served to some extent with a very few customers by the cooperative with power furnished by the TVA but that the larger number of customers were being furnished power by the private utility, and the proof further shows up to this time that the co-op with power furnished by TVA was serving the greatest number of customers in the county of which the two towns were a part with the private utility serving, I assume, comparatively few customers, twelve hundred, I believe, in the county—I don't know if the proof has shown [fol. 637] how many are in the county outside of the towns being served, how is the Court going to set up the area and fix the lines and enter a decree according to your contention?

Mr. Marshall: I answer that first in the language of the statute.

The Court: Well, I think I know what the statute says. The statute says that the TVA shall not go into a territory that is not being primarily served by it as of July 1, 1957, and there is a proviso in there to the effect that if customers are being served by a private utility in an area that the TVA shall not serve those customers, within a municipality.

The TVA says that that refers to this 5-mile area, towns in that 5-mile area, and I will not undertake to decide any dispute between you at this time, but I just wanted to get your position.

I think I know what the Act provides in substance, but I don't know at this time if we get to that question what the Court would say in its decree as to the territory of the private utility.

When did you change the name to investor utility? I

always heard them called private utility. I know this is an investor——

[fol. 638] Mr. Marshall: We are public utilities too. I think that developed out of this public power-private power situation, and we are a public utility, we serve the public.

The Court: You called it a private investor——

Mr. Marshall: Investor-owned utility.

The Court: Investor-owned utility.

Mr. Marshall: We could have said private utility or distinguish it from public owned in the sense of TVA.

To answer the Court's question, in our judgment the statute would entitle us to an injunction that TVA and Powell Valley not serve any customers in these municipalities. They have, however, as matters developed——

The Court: You don't mind if I ask a question when you speak?

Mr. Marshall: No, sir.

The Court: Without finishing. I don't mean to be abrupt to interfere with your chain of thought. But you want the Court to say that these twelve that were being served, or the 30 that were being served, the twelve being served on July 1, 1957 and the 30 in 1959——

Mr. Marshall: I think there were 30 in 1957.

[fol. 639] The Court: The numbers don't amount to much except they are small, but what do you think the Court ought to do with those customers of the co-op?

Mr. Marshall: I have to answer you first in terms of what I think the statute directs. I think the statute would entitle us to a judgment that they discontinue serving them; however, we have not asked for that.

We have not even asked that they give up customers that they had taken in these small extensions up until the time this major controversy of actually taking our own customers developed.

We have asked in the prayer of the complaint that they be enjoined from serving any customers that they did not serve on October 30, 1963.

I think that that is less than we are entitled to, and I think it keeps the Court from having to define burdensome service areas in a municipality. We don't think they are entitled to pick up any customer, certainly after the customers they served on July 1, 1957. But there was a gap. The Act

was not passed for two years later, August, 1959, and we have not asked that they give up the customers that they actually served between July and August, 1959. It is not many. I think only three added in this whole 2-year period, [fol. 640] and then they had their facilities constructed from the outlying areas as shown on the map and picked up other customers in those areas up to October 30, 1963, and then they started on a program of taking our meters out and putting theirs in. That is what led us into court.

The Court: You are asking for an injunction against the TVA?

Mr. Marshall: Against any of these defendants serving any customers that they did not serve on October 30.

The Court: The TVA is not serving anybody, as I understand it. It is just furnishing the power.

Mr. Marshall: The injunction would read, I think, as framed in our complaint against TVA from selling and Powell Valley from buying and distributing power to any customer not a customer of Powell Valley on October 30, 1963, when they started the raiding activities.

The Court: That is based on the premise that this Act provides in sugstance that the TVA shall not furnish power to a distributor in an area where TVA was not the primary source of power to a distributor; is that the idea?

Mr. Marshall: Yes, sir.

[fol. 641] The Court: All right.

Mr. Marshall: I hope I have made our position clear because we certainly want to answer any question the Court has on it. If I haven't made it clear, I would like to try further.

The Court: It is about as clear as anything I guess can be made about this suit and about this Act and about the problems involved.

Mr. Marshall: We have not asked for the harsh result. We are trying to ask for something that we think would be workable. It was workable before. It was workable under the 1958 agreement but they did not want to abide by that and started taking our customers and we had to come into court.

By Mr. Marshall:

Q. Mr. Lewis, I believe Mr. Ardery this morning cross examined Mr. Duncan and Mr. Asher with respect to checks tendered by Kentucky Utilities to Tazewell and New Tazewell in February of 1963.

Were you present at the meeting at which those checks were tendered?

A. Yes, sir, I was.

Q. Were those checks tendered with previously written letters, one addressed to the Honorable Mayor and Council of Tazewell and another to the Mayor and Council of New [fol. 642] Tazewell?

A. Yes, sir, they were.

Q. Was this a joint meeting of those towns?

A. This was a joint meeting in the county court room in Tazewell, a joint meeting of the councils of Tazewell and New Tazewell.

Q. Was the Mayor of Tazewell present?

A. Yes, sir. The Mayor of both towns was present.

Q. Were you the only Kentucky Utilities representative present?

A. I went there with Mr. W. A. Smith who is district manager of that particular area in Middlesboro and Tazewell, Claiborne County.

Q. And these checks were attached to a letter, one check to each letter to the town and delivered with the letter; is that correct?

A. That is correct. And in the letter—one of the letters, I couldn't say which, to which Mayor, but one of the letters was read aloud by Mr. Smith to this meeting and then he handed each Mayor his letter and check.

Q. Are the letters substantially identical?

A. Yes, sir. They are identical except for the name of the Mayor and the amount of each check.

Q. Now the Court has heard a lot today. It was suggested [fol. 643] in the cross examination that these checks were offered in exchange for some sort of new franchise. I believe that is correct. That was the inference in the cross examination.

I will ask you to read to the Court the letter dated February 19, 1963 to the Mayor and Council of the City of Tazewell.

A. Yes, sir.

"You are no doubt aware that Kentucky Utilities Company has recently entered into a program of franchise payments to cities in Kentucky of 3% of all revenue derived from residential and commercial customers within their corporate boundaries. These franchise fees are paid annually during the life of a 20 year franchise executed by each community. 131 of the 150 eligible communities in Kentucky are now receiving these payments; 129 of which have executed new 20 year franchises and 2 under existing perpetual franchises.

"This program proved to be highly satisfactory and of real benefit to these communities and the same offer was later made to the 9 incorporated towns served by Old Dominion Power Company in Virginia. However, a policy of the State Corporation Commission of Virginia, which apparently requires that the cost of such payments be added to the bills of electric customers living in the communities receiving them has delayed action in the negotiation of [fol. 644] the required franchises, and might eliminate the possibility of these payments in that state.

"Following investigations and approval by legal counsel, we are happy to advise that these payments can now be made available to the incorporated communities we serve in Tennessee. Since a valid, perpetual franchise to operate in Claiborne County was granted to Dixie Power & Light Company, its successors and assigns, on April 5, 1926, and the transfer of this franchise to Kentucky Utilities Company was approved by the Tennessee Railroad and Public Utility Commission on May 25, 1954; we are advised that it will not be necessary for your City to take any further action to become eligible for these payments on an equal basis with the communities in Kentucky.

"We have been able to make these payments for your town retroactive to January 1, 1962, and are pleased to enclose herewith our check in the amount of $1,823.77 as payment of this fee for the calendar year 1962. This payment is in addition to the regular ad valorem and other taxes paid by our company to local, state and federal governments, which will, of course, continue in the usual manner.

"These payments will henceforth be made annually on or

prior to March 1 of each year for the year preceding. However, since we are strictly opposed to any arrangement [fol. 645] which might operate to increase the cost of electricity to our customers, we must reserve the right to discontinue these payments should any state or local law be enacted or interpreted, or any ruling of the Utility Commission be made or interpreted which would require their cost to be passed on to consumers living in the locality receiving them.

"As a responsible business citizen of New Tazewell, we welcome this opportunity to be of substantial assistance in the operation and development of the City. It has long been our experence that the growth and prosperity of our company is closely related to the progress of the communities it serves.

"We will be happy to supply any further information you may desire regarding this matter, and ask that you do not hesitate to call on us at any time we may be of service to you."

That is signed, "Kentucky Utilities Company, W. A. Smith."

This was the letter to—I think this is addressed—this had New Tazewell on the back page and I think this possibly got stapled on to the letter of Tazewell.

Mr. Marshall: We offer that letter as Exhibit No. 41.

[fol. 646] (Exhibit No. 41 was filed.)

Mr. Marshall: And the letter bearing the same date to the City of New Tazewell will be offered as Exhibit No. 42, and I will simply state to the Court that I followed his reading of that letter and they are the same except the dollar amount of the check recited in the letter.

We offer this as Exhibit No. 42.

(Exhibit No. 42 was filed.)

By Mr. Marshall:

Q. You say that one of those letters was read on this night at this meeting when these checks were offered?

A. Yes, sir.

Q. And did the Mayors of the two towns keep the letters and the checks on that occasion?

A. Yes, sir, they kept the letter and following some discussion there at the meeting they asked—during that discussion they asked specifically if this would involve them in granting a new franchise, and I think both Mr. Smith and myself, different times during the meeting, assured them that it did not, that this was payment for an existing perpetual franchise. And they kept the letters and kept the checks. They told us they would seek legal counsel on the matter and advise us later whether they would accept them or not.

[fol. 647] Q. I believe thereafter they did return the check and not cash them?

A. Returned the checks back in June of that year, 1963.

Q. Did you at any time make any request of any representative of either Tazewell or New Tazewell that either community grant KU a new franchise?

A. I did not.

Q. Did any representative of KU at any time ever, in your presence, make any such request?

A. No, sir.

Q. Do you have any knowledge of any such request ever being made by any representative of KU?

A. None whatsoever.

Q. After that meeting that night did you have occasion to write another letter together with Mr. Smith, I think he signed the letters, to the two Mayors about the same subject of a franchise?

A. Yes, sir, we did.

Q. What led you to write that letter?

A. An article appeared in the Middlesboro Daily News published in the City of Middlesboro, Kentucky, which stated that the checks were being returned and that we had asked the cities to accept these checks in return for a new 20-year franchise.

[fol. 648] I don't see how we could have made it any clearer in the original letter, but we decided to write them again lest there be any misunderstanding.

Q. I hand you now copy of the letter dated June 27, 1963, signed W. A. Smith, district manager of Kentucky Utilities, addressed to Mayor Hardin of Tazewell, and copy of the letter bearing the date of June 26, 1963 signed the same way, addressed to Mayor DeBusk of New Tazewell, and I

will ask you to read first the June 26 letter, read that to the Court, if you will.

A. All right, sir. This letter was to Honorable Bill DeBusk, Mayor, City of New Tazewell, New Tazewell, Tennessee.

"Dear Mayor DeBusk:

"This letter will acknowledge receipt of the check for $1,967.65 which your City recently returned.

"Since reading a news story about this check in the June 12th, 1963 issue of the Middlesboro Daily News, we feel that a very serious misunderstanding exists concerning this franchise payment. This article states, 'KU has offered a yearly check to the City for a 20-year franchise.' This most certainly is not the case. You will recall that a letter was read to your Council and delivered together with the check, on February 19, 1963. This letter stated that our Company is operating in your City under a valid perpetual franchise [fol. 649] and that you were required to take no further action to become eligible for these payments.

"During the discussion which followed at this meeting, it was further stated that, in our opinion, the question of whether or not such a franchise existed, would not be affected by your acceptance of this payment. It was my belief that an agreement was reached at this meeting that your City would refer this question to competent legal counsel before reaching a decision as to whether or not you should cash the check.

"Although we thoroughly understand your feelings in not wishing to accept this payment in light of the present proceedings regarding acquisition of our distribution system, we remain of the opinion that the acceptance of such payment would not legally affect your City's right or ability to make such acquisition.

"We sincerely hope that the present situation concerning our Company's operation in your City will be satisfactorily cleared up, and ask that you advise us at any time in the future you should desire to take advantage of these 3% franchise payments."

That was signed by W. A. Smith, district manager.

And we felt the misunderstanding was so serious that

copies of this letter were sent to the Aldermen of New [fol. 650] Tazewell and to Mr. Ault, the recorder.

Mr. Marshall: File that as Exhibit No. 43, the letter just read into the record.

(Exhibit No. 43 was filed.)

Mr. Marshall: And as Exhibit No. 44, we file the letter dated June 27, identical except for the dollar amount of the check and the address, and so forth, to the Mayor of the City of Tazewell, again with copies sent to the Aldermen and the recorder of that city.

Mr. Ardery: Mr. Marshall, may I look at one of those, please?

Mr. Marshall: Yes (handing letter to counsel).

(Exhibit No. 44 was filed.)

By Mr. Marshall:

Q. I believe that Kentucky Utilities was making these payments in Kentucky to towns where it did not have a franchise in an effort to obtain long term franchises, is that correct?

A. We were offering those payments to towns. We were not giving it to the towns unless we had a franchise.

Q. Well, you were offering them where you did not have a franchise in an effort to obtain a franchise, were you not?

A. Yes, sir.

[fol. 651] Q. And then why did you make those same payments available to other towns where you already had long term franchises?

A. This program of franchise payments was started on January 1, 1961 in Kentucky, and most of the towns took advantage of the offer and were drawing these payments.

Then we looked around and found we were operating in a few towns under perpetual franchises as previously mentioned, two in Kentucky, and we thought that was discriminatory to those towns and made the same payments to—decision was reached to make the same payment to them.

Q. And then you followed up on this program in Virginia and then in Tennessee?

A. In addition, we made these payments—we had the remainder of the period on a 99-year franchise in Cumberland Gap, Tennessee, and after we offered these payments to Tazewell and New Tazewell we made the same offer to Cumberland Gap. We did not ask for a new franchise feel-that 80-some years was better than 20. So they are now drawing the checks and have received the checks without executing any new franchise.

Mr. Marshall: Turning now to acts of these defendants that led to this litigation in taking customers supplied by KU commencing October 31, 1963, we offer as Exhibit No. 45 a list of customers now served by Powell Valley.
[fol. 652] And by that I don't want to provoke argument as to whether they are served by the cities or Powell Valley. They are served in one way or other off the Powell Valley system in Tazewell and New Tazewell since October 30, 1963 who were formally served by Kentucky Utilities.

By Mr. Marshall:

Q. Do you have a copy of that list with you, Mr. Lewis?
A. I have one that hasn't been changed.
Q. Which one are you referring to?
A. I have one which I think covers it.

(Exhibit No. 45 was filed.)

By Mr. Marshall:

Q. I think the exhibit is self-explanatory except that you might count the customers in New Tazewell formerly served by Kentucky Utilities and now served by the defendants, and state that number into the record.

A. There were nine such customers in New Tazewell, 11 in Tazewell.

Mr. McCarthy: May I address a question to counsel?

The Court: Yes.

Mr. McCarthy: I understand from your introductory [fol. 653] statement you are changing the title of this to read something like "Customers Served by Powell Valley or Tazewell or"——

Mr. Marshall: No, I don't want to make that. I say, we

are not trying to make the point how they are served by this exhibit. We have accepted that they are served in some manner or other for the purpose of this exhibit. We think they are served by Powell Valley, the evidence will show.

By Mr. Marshall:

Q. You say there are nine such customers in New Tazewell and how many in Tazewell?

A. Eleven.

Q. Eleven?

A. Yes, sir.

Q. What is the earliest date as shown by this exhibit when Kentucky Utilities first established electric service to any of the locations involved without regard to their identity or who owned the location at that time?

A. The earliest date we have record of, and this is not from records, it is from memory of some of the older people, we served the location where the V.F.W. Club is at the time Dixie Power & Light Company originally acquired this property, which was in the '20s.

Q. 1920s?

[fol. 654] A. Yes.

Q. You had served a building at this location since some time in the 1920s?

A. Yes. This building was occupied by Mr. Scott Mayes, a councilman of one of the Tazewells and remembered that.

Q. What is the nature of most of KU contracts with those electric power customers in these towns?

A. Most of them are oral contracts. A customer comes by the office and makes a deposit if required or if not required he calls on the telephone and asks for service to be established at a certain location. We go out and connect this service and serve him there until some further change is made.

Q. In other words, just for normal residential service you don't routinely have written contracts; is that correct?

A. No, sir. That is correct.

Q. Refer to this list, Exhibit 45, of customers——

A. I would like to qualify that. In case there is a rate which, any rate, which has an optional rate to consume—it is not an optional rate with the company, it is optional

with the customer, then he does sign a card or something to indicate he has exercised this option.

Q. With what customers on this list, Exhibit No. 45, did [fol. 655] Kentucky Utilities have written contracts prior to the time that the defendants took these customers?

A. We had written contracts with three customers.

Q. Name the three.

A. The Brooks Manufacturing Company, the Dayton Shockley residence, and the Kenneth Western residence. Those were different from the residential customers I just described in that they were electric heat customers.

Q. I phrased that last question that you had written contracts with these people up to the time the customers were taken by the defendants. Did any of these people ever act in writing to terminate these contracts in any way?

A. No, sir.

Q. I show you KU's signed copies of these three contracts.

Mr. Marshall: First, we will offer a photostatic copy of the contracts dated February 17, 1957 with Brooks Wood, Incorporated, in New Tazewell as Exhibit No. 46.

(Exhibit No. 46 was filed.)

Mr. Marshall: We offer a photostat of a contract of September 11, 1961 with Kenneth Western of New Tazewell as Exhibit No. 47.

(Exhibit No. 47 was filed.)

[fol. 656] By Mr. Marshall:

Q. Mr. Lewis, I notice that the contract with Brooks Wood shows the address of New Tazewell whereas our exhibit shows that it is Tazewell. Which is correct?

A. The company is located in Tazewell. This must be a typographical error.

Mr. Marshall: We will offer the photostatic copy of the September 28, 1962 contract with Dayton Shockley of Tazewell as Exhibit No. 48.

The Court: These are the written contracts you are talking about?

Mr. Marshall: Yes, sir.

(Exhibit No. 48 was filed.)

By Mr. Marshall:

Q. I notice that in referring to all of these contracts they state that the service is supplied under rates "which are on file with the Public Service Commission of Kentucky." Will you explain that, please?

A. Yes, sir. My face is a little red on a mistake of this sort. These contracts were normally made or written out in our Middlesboro office, and we have had, and do have printed contracts which say Tennessee. In case that we use these forms we occasionally type through Kentucky and wrote Tennessee and that was neglected to be done on this contract. Those who check this contract are, I am afraid, [fol. 657] too apt to look at the spaces to see that they are filled in properly and not read the printed text. This escaped us.

Q. Are Kentucky Utilities Company's rates routinely filed with the Tennessee Commission?

A. Yes, sir.

Q. Up to a time in 1958 when Kentucky Utilities had a rate increase in Kentucky not allowed in Tennessee, were the rates in Tennessee and Kentucky about the same?

A. Yes, sir, they were the same.

Q. Is there any other error in these contract, any of these three contracts I have handed you?

A. Yes, sir. I know that we had a heating rate established, I think it was in 1960. A special heating rate designed as a promotional rate to promote electric heat in homes and businesses.

These rates were filed in all states we served, Kentucky and Virginia. I have since learned that we have served nine or ten customers in Tennessee and that rate was never actually approved by the Commission.

Q. By the Tennessee Commission?

A. By the Tennessee Commission.

Q. Was that same heating rate filed with the Kentucky Commission?

A. Yes.

Q. Was it approved by the Kentucky Commission?

[fol. 658] A. Yes, sir, it was approved.

Q. But it was not approved by the Tennessee Commission?

A. No, sir.

Q. But it was used in these contracts with these Tennessee customers?

A. Yes, sir. We served the customer with the electric heating on this rate which was a cheaper rate than the residential rate they were entitled to in Tennessee.

Q. There was some suggestion in the cross examination this morning that that might have been done for the purpose of swinging over some of these contract customers to KU, or something like that.

Was that same heating rate made available on the same terms and conditions to anybody in Tennessee who asked for it whether he was in Tazewell or New Tazewell, Cumberland Gap, or where he was?

A. Yes, sir, it was. In fact, we made an effort to promote this use and a man was customarily employed to call on people and explain this service to them.

I would think the date on one of these contracts of September 11, 1961 would preclude the possibility of us offering him a special rate in this situation.

Q. Has a heating rate substantially like the one that was mistakenly made available to these customers now been [fol. 659] filed and approved by the Tennessee Commission?

A. Yes.

Q. Mr. Lewis, I hand you a series of photographs which have already been stipulated in evidence. I think, if I may, I will hand the original to the Court. Do you have another set of those?

Mr. Marshall: Maybe we should have them identified as exhibits first.

The Court: After they are identified he can testify about them and I will look at them while he is testifying.

Mr. Marshall: We offer as Exhibit No. 49 a photograph captioned Skyvue Restaurant dated October 31, 1963.

(Exhibit No. 49 was filed.)

By Mr. Marshall:

Q. What are these dates on these photographs?

A. The dates the photographs were taken.

Mr. Marshall: Exhibit No. 50 is a photograph of the T Craft Marine Supply Company. All these photographs are dated and taken October 31, 1963.

(Exhibit No. 50 was filed.)

Mr. Marshall: Exhibit No. 51 is a photograph of the Kenneth Western residence and No. 52 is the Mossie Keck [fol. 660] and Dana Day residences.

(Exhibits No. 51 and 52 were filed.)

Mr. Marshall: And Exhibit No. 53 is of the Coffey subdivision and No. 54 is of the Darrell Campbell residence; Exhibit 55 is of the Brooks Furniture Manufacturing Company and No. 56 is the Cecil Hurst residence.

(Exhibits No. 53 through 56 were filed.)

By Mr. Marshall:

Q. Mr. Lewis, referring to the photograph of T Craft Marine Supply Company, would you explain that photograph to the Court, if you will?

A. All right. This, you see, we have added a notation in India ink to the photograph down to the pole and identified them. We had a service connected to what is marked the old building, T Craft Marine Supply, and we had been serving it for some time when they constructed a new building on one end of the old building and they applied for service from, and received service I assume, from REA. This was well before the action by the cities.

Q. Coming back, the left pole as you look at it is a KU pole closest to the building?

A. Yes.

Q. Set April 19, 1956.

A. Yes, sir, it was.

[fol. 661] Q. Now there is an REA pole to the right further away from the building set during or after 1963; is that right?

A. That is right.

Q. Explain those service drops.

A. The one service drop from the REA pole coming into the new building had been previously installed, previous to this October 30 activity, to serve the load in the new building, and apparently that was an REA service. I assume it was since it was previous to that action.

Then a simple service drop was installed from this REA pole to the old building of T Craft Marine Supply which is the distribution system of the city, or which is supposedly installed by contractors for the city. They later disconnected our service, removed our meters from the socket and connected their service and installed a meter which belonged to Powell Valley.

Q. Now the Cities of Tazewell and New Tazewell, in fact all of the defendants, take the position in this case that these cities have some kind of a municipal distribution system, that this is not really Powell Valley which took T Craft Marine Supply Company, that this is a city municipal system.

Will you comment on that contention with respect to the facts shown by that photograph?

[fol. 662] A. Yes, sir. Most of the other customers are in scattered locations about the towns, many of them consisting of a simple service drop from an existing REA pole to the customer's premises. A few of them had poles set and transformers installed on some new poles. There was some transformers changed for larger transformers on existing Powell Valley poles to serve these customers.

Q. Let's take this T Craft Marine Supply. That REA pole you say was set before any of this so-called construction of a so-called municipal system, wasn't it?

A. Yes, sir.

Q. And the co-op was serving his load from this pole which belonged to it to what is designated as the new building?

A. Yes, sir.

Q. As far as this municipal system relating to them providing service, it is nothing but that service drop from this pre-existing REA pole?

A. That is all.

Q. Is that service drop which went to the T Craft Marine Supply previously served by KU, is that service drop

connected in any manner to any other part of what was constructed as a part of this so-called municipal system?

A. Only through the distribution of Powell Valley.

Q. Well, I am not talking of electrically related to some- [fols. 663-665] body's distribution. Is it physically connected in any manner to any part of the rest of the municipal system of this city?

A. No, sir.

Q. It runs from Powell Valley's facilities to your old load, doesn't it?

A. That's right.

The Court: Is that a good place to stop?

Mr. Marshall: Yes, sir.

The Court: Adjourn court until nine o'clock tomorrow morning.

(At 4:35 p.m., court adjourned until nine o'clock a.m., Tuesday, September 22, 1964.)

[fol. 666] Exhibits

57	
58	Original copy of map, Exhibit No. 36
59	Indenture between PVEC and Domenion National Bank
60	Notes of meeting held 4-12-62
61	Notes of meeting held 11-6-62
62	Notes of meeting held 11-15-62
63	Notes of meeting held 11-27-62
64	Notes of meeting held 12-18-62
65	Notes of meeting held 2-12-63
66	REA letter to Mr. Miner, 8-29-63
67	List of customers of Tazewell and New Tazewell
68	Letter, Berry to Hunter, March 3, 1961
69	Letter, Hunter to Berry, 2-27-61

[fol. 667]

70	Memo, House to Manager's Files, 9-1-61
71	Memo, House to Manager's Files, 4-18-62
72	Memo, House to Button, 10-17-62
73	Memo, House to Button, 10-18-62
74	Memo, House to Manager's Files, 11-19-62
75	Memo, Button to Wells, 11-20-62
76	Memo, House to Manager's Files, 11-28-62
77	Memo, Button to Manager's Files, 12-5-62
78	Memo, Van Mol to Wessenauer, 12-10-62
79	Letter, House to Miner, 12-14-62
80	Memo, House to Button, 6-20-63
81	Letter, Miner to House, 8-26-63
82	Letter, Mayors of Tazewell and New Tazewell to Miner 9-11-63; letter, Miner to House, 9-13-63; Memo, House to Button, 9-16-63; Letter, House to Miner, 9-23-63
83	Letter, Miner to House, 12-26-63
84	Letter, Miner to House, 3-18-64
85	Letter, Miner to two mayors, 9-24-63
86	Form of Petition circulated by Tazewell
87	Bank Statement for Tazewell
88	Bank Statement for New Tazewell
89	Form of Petition circulated in New Tazewell
90	Resolution or motion concerning issuance of anticipated revenue note, New Tazewell

[fols. 668-669]

91	Map, Customers and Lines of TVA Power Distribution as of 7-1-57 in Claiborne County
92	Map, Expansion of TV Service Area Under S-931 and HR 3460
93	Minutes, TVA Board of Directors Meeting, 8-26-64

[fol. 670] Second Day of Trial

Tuesday, September 22, 1964

(At 9:15 a.m., court reconvened pursuant to adjournment, when the following proceedings were had.)

The Court: Gentlemen, you may proceed.

Milton H. Lewis, a witness on behalf of the plaintiff, resumed the stand, was examined and further testified as follows:

Direct examination. (Continued)

By Mr. Marshall:

Q. Mr. Lewis, when we adjourned yesterday afternoon we were discussing some photographs of residences which had been served by the Kentucky Utilities Company prior to October 31, 1963 and which on or after that date were taken over by the defendants, KU's service removed and defendants' service substituted.

As background so that your comments will be in context, the defendants take the position that the cities of Tazewell and New Tazewell are engaged in the construction of some kind of municipal electric distribution system; that this service that we are discussing to these taken over residences is not Powell Valley service, it is city service.

With that background are there some instances beside the one about which you testified yesterday in which a transformer on a Powell Valley pole that was set prior to [fol. 671] this activity was simply replaced with a larger transformer and then the existing service drop of Powell Valley from that transformer to a Powell Valley customer was continued and then a new service drop from that transformer to one of these taken over customers was installed?

A. Yes, sir. There are three such cases, all of them in New Tazewell. They are in New Tazewell.

Q. Is Sky View Restaurant one such case?

A. Sky View Restaurant is a case where a new trans-

former was installed on an existing Powell Valley pole and a service drop installed to the restaurant.

Q. With respect to Sky View Restaurant, of what does this so-called city municipal distribution system consist?

A. Well, a transformer was installed on an existing REA pole and a service drop was installed from this pole to the building.

Q. Now physically speaking if my question makes sense to you, going backwards from that REA pole, what facilities were—in other words, starting from the house as the ultimate end of the service, you have the service drop and then you have a transformer on the REA pole, and then on continuing backwards what facilities are there?

A. The facilities of Powell Valley.

Q. The electric distribution system of Powell Valley?

[fol. 672] A. Yes, sir.

Q. Physically speaking is that service drop which the city installed down to the Sky View Restaurant from an REA pole, is that service drop in any manner connected to any other part of this so-called city distribution system?

A. No, sir. I say the city owns no property connecting its customers other than in a few cases. Physically it is not connected to the others.

Q. It is connected to the Powell Valley system?

A. Yes, sir.

Q. Will you look at the photograph of the Cecil Hurst residence, Exhibit No. 56. I believe in that photograph the residence is over the hill out of sight, is that right?

A. Yes, sir. We could not show the residence and these poles and conductors in the same picture.

Q. Now at the immediate righthand edge of the photograph there is an REA Powell Valley pole, is that correct?

A. Yes, sir.

Q. And that pole was set during or after 1962 as shown in the photograph?

A. Yes, sir, and it was a line pole. It was set prior to October 30, 1963. Also existing at the time these new facili-

[fol. 673] ties were built.

Q. Well, specifically, as shown by the tag on the pole was this set in 1963 or 1962, or can you tell?

A. We can't tell. We know it was set prior to October 30, and we know that it was set during or after 1962.

Q. In this instance the Cecil Hurst instance, what was added to extend the service, the new service to Cecil Hurst.

A. Well, immediately to the left of that pole we have shown a pole which is marked "new city pole," and then there is a service drop which comes from that pole down to the residence just behind the hill.

The conductors from the Powell Valley pole to the new city pole consists of service cable. To the left of that, in the extreme left of the picture, is our pole which was set prior to August of 1948, and you see our service drop going over the hill to the Cecil Hurst residence.

Q. In other words, the pole had been there since August of 1948?

A. Yes, sir.

Q. All right. In that instance then what facilities make up this city distribution system serving the Cecil Hurst residence?

A. The service drop from the residence to this new pole, and the service cable on over to the REA pole, and then I [fol. 674] would say the new pole itself.

Q. Are those facilities ostensibly installed by the city physically connected to any other part of the city distribution system serving any other customer?

A. In this particular case the REA pole shown in the right of the photograph is the pole from which the service to Sky View Restaurant comes. So this Cecil Hurst residence would be physically connected to the Sky View Restaurant and to no others.

Q. In other words, those customers in this instance were run off of one pre-existing REA pole?

A. Yes, sir.

Q. But no others?

A. No others.

Q. On your list of customers previously served by KU and taken by the defendants commencing in October of 1963, there is the name of Wade Honeycutt.

Did KU furnish electric service to the location of Wade Honeycutt where a building was being constructed?

A. Yes, sir, we did.

Q. Are you furnishing service to that location now that the building has been completed?

A. No, sir.

Q. Is service being furnished to that location by one or [fol. 675] other of the defendants?

A. Yes, sir, it is.

Q. Were we furnished by the deefndants a list of customers being served by this so-called city distribution system?

A. We were.

Q. Is the name of Wade Honeycutt on that list being served by the city?

A. It is not.

Q. Actually, I believe the site and the residence were probably sold by Mr. Honeycutt to somebody else; is that correct?

A. That is correct.

Q. What is the name of the individual who owns that property now?

A. It was sold to Mr. Lawrence Muncey.

Q. Is Mr. Lawrence Muncey's name on the list furnished to us by the defendants as the list of customers being served by these two cities?

A. No, sir.

Q. If this residence where Wade Honeycutt or Lawrence Muncey is being served by the defendants and is not being served by the city, what conclusion do you draw from that fact, or those facts?

A. They must be served by Powell Valley.

[fol. 676] Q. Are there any instances in either of these two towns in which after the so-called city facilities were put up Powell Valley has utilized any of those facilities for service to other customers not on this city list that you know of?

A. Would you repeat the question, Mr. Marshall?

Q. Maybe I am asking if this Wade Honeycutt or Lawrence Muncey residence is in this category.

In serving this Lawrence Muncey or Wade Honeycutt location is any facility in this new city system involved in that service?

A. No, sir.

Q. In cross examining one of the witnesses yesterday, Mr. Ardery asked if all of the power for the Tazewell and New Tazewell area did not pass through a sub-station owned by Powell Valley, and I now ask you who supplies all of the power going into that sub-station?

A. KU Company.

Q. Is that for customers of KU Company and also power ultimately going to customers of Powell Valley?

A. Yes, sir, it is.

Q. Does it in fact include all of the power that ultimately goes to the customers in this so-called city system?

A. Yes, sir.

[fol. 677] Q. Again with the preface to the Court that we do not consider service in Claiborne County outside Tazewell to be material considerations but for the purpose of getting all the facts in this record for the Court's consideration, I will ask you if you have prepared an exhibit consisting of a comparison of the kilowatt hours of electricity delivered in Claiborne County during the year 1957 by Powell Valley Electric Co-operative and Kentucky Utilities Company?

A. Yes, sir, I have.

Mr. McCarthy: Before you go on to that, may I ask counsel a question? I was not listening to the inquiry about the power going into the Powell Valley sub-station.

At the pre-trial hearing I understood that it was agreed that this lawsuit was being tried on the assumption that this is TVA power and coming in. Is that agreement still in effect or have you changed?

Mr. Marshall: Wait just a minute. I am not changing position. We never said this power coming in was TVA power. We deliver power to that substation, a quantity of it for TVA.

Mr. McCarthy: For TVA. So that you are meaning to contend here that this is KU power that Powell Valley and the city receive?

Mr. Marshall: Not in the sense that we are selling power [fol. 678] to Powell Valley.

Mr. McCarthy, the reason I mentioned this was because Mr. Ardery mentioned the sub station yesterday. You and I both agree on the same view that we expressed at the pre-trial, that neither the ownership of the sub-station or ownership of the transmission supplying the power to the sub station is a material consideration.

Mr. McCarthy: That is my understanding.

Mr. Marshall: And still of the view I expressed at the

pre-trial but yesterday Mr. Ardery brought in the fact that the sub station is owned by Powell Valley.

I did not want that fact in the record alone without the accompanying fact as to who supplied the power to the sub-station.

I think if we could agree on both of those facts, there would be no more mention as being not material. We would have no trouble. I don't want one without the other.

Mr. McCarthy: Give me just a moment.

Mr. Ardery: I would like also, Mr. Marshall, to mention that in your requested finding of fact you inserted a request of findings of fact that you did own the transmission line. We did not, as I recall, request any finding of fact [fol. 679] that we owned the substation. At that point I think we were living up to the agreement. I believe I am correct.

This is Finding No. 22 requested by KU.

"Within the corridor of KU service area referred to in Finding No. 21, KU on July 1, 1957, owned, maintained and operated a 34.5 KV transmission line, a sub-station and approximately ——— miles of distribution lines operated at 12 KV. Within this corridor in Cailborne County and outside the incorporated municipalities of Tazewell and New Tazewell, KU on July 1, 1957, supplied the electric energy requirements of approximately 1,278 customers who at that time consumed a monthly average of 378,266 KWH of electric power. In 1963, such 34.5 KV transmission line of KU was rebuilt to 69 KV and now is owned, maintained and operated by KU, within this corridor of KU's service area . . ."

That to my mind was the point of beginning of departure from the agreement made at the pre-trial conference.

Mr. Marshall: It was not our intention that that be added to but the further fact that that transmission line supplied all this power.

We did not want the findings of fact to show this is an [fol. 680] empty corridor. It has all the physical facilities in it.

Mr. Ardery: Let's find out what the physical facilities are.

Mr. Marshall: That you own a sub-station in that site. I think we have no difference.

We do not intend to argue that the fact of power supply is that part of the agreement, that we are a power supply of Powell Valley. We do not consider that we are.

We physically furnish the power but it is not—what we deliver to Powell Valley we consider to be TVA or for TVA.

We offer this exhibit last referred to—I had better just state again—a comparison of kilowatt hours delivered in Claiborne County during 1957 by Powell Valley Electric Co-operative and KU as Exhibit No. 57.

(Exhibit No. 57 was filed.)

By Mr. Marshall:

Q. Mr. Lewis, what quantity of kilowatt hours did KU deliver in Claiborne County, this being kilowatt hours for its own customers, during the year 1957?

A. Delivered 8,420,400. We delivered that amount of kilowatt hours from our various sub-stations. There may have [fol. 681] been some line loss involved. I am not saying we metered that amount to our customers.

Q. This was not from the customers' meter, I understand that.

A. This is the amount of power we took from sub-stations for delivery in Claiborne County.

Q. But the point I wanted to make is that this does not include any power delivered—that was used by Powell Valley and supplied as the matter of contract by TVA, that is not included in this figure of KU deliveries, is it?

A. No, that is for delivery to our customers.

Q. And the line loss in connection with your use for your own customers?

A. Yes, sir.

Q. During the same years, 1957, what quantity of power did Powell Valley deliver to its customers in Claiborne County on the same basis?

A. On the same basis they delivered 7,831,710.

Q. Kilowatt hours?

A. Kilowatt hours.

Q. As between these two utilities, Powell Valley and KU, what per cent of the power delivered in Claiborne County in 1957 was delivered by KU?

A. We delivered 51.8 per cent of the total amount of energy delivered by the two distributors in Claiborne [fol. 682] County.

Q. Now I realize that this figure for the whole year 1957 does not include quantity delivered by a third distributor in the county. What distributor was that?

A. The Lafollette Electric System.

Mr. Marshall: At this time, if it please the Court, I would like to read into the evidence one or two facts stipulated by the parties on September 10.

This paragraph 1 on page 3 of the stipulations states:

"As of July 1, 1957, TVA distributors of electric power (Powell Valley Electric Co-operative and City of Lafollette Electric System) served a total of 3,564 customers within Claiborne County, Tennessee, and on the same date Kentucky Utilities Company served 1,839 customers within Claiborne County."

By Mr. Marshall:

Q. Mr. Lewis, have you figured out roughly the percentage of the total customers supplied with electric service in Claiborne County on July 1, 1957 which percentage was supplied by KU?

A. Yes, sir.

Q. What is that approximate percentage?

A. I can't remember the exact figure. It is in excess of [fol. 683] one-third.

Q. You wrote it down on my notes, so read your own note.

A. This is about 33.8 per cent of the customers.

Mr. Pedersen: What was that again?

Mr. Marshall: 33.8.

Mr. Pedersen: That is the number of percentage of customers that KU serves in the county?

The Witness: In the county.

Mr. Marshall: Paragraph 2 of the stipulation has already been covered. It is the customers in the towns.

Paragraph 3 is as follows:

"During the months of June and July, 1957, TVA distributors (Powell Valley Electric Co-operative and City of Lafollette Electric System) supplied an average of approximately 1,015,000 KWH of electricity per month to their customers within Claiborne County, Tennessee, and during the same period Kentucky Utilities Company supplied an average of approximately 610,000 KWH per month to its customers in Claiborne County, Tennessee."

By Mr. Marshall:

Q. Have you similarly figured out the approximate percentage of the total kilowatt hours sold in the county dur-
[fol. 684] ing those months, or the average of those two months, supplied by KU?

A. Yes, sir, I have. That is about 37.5 per cent.

[fol. 685] Q. Paragraph 4 of the stipulation is as follows, quote:

"In 1947, the depreciated book value of plant investment in distribution facilities of electric distributors within Claiborne County, Tennessee, was as follows:

"a. TVA distributors (Powell Valley Electric Co-operative as of January 10, 1957, and City of Lafollette Electric System as of June 30, 1957) $902,999.17.

"b. Kentucky Utilities Company (as of June 30, 1957) $457,947.93."

Have you similarly figured out the approximate percentage of the depreciated book value of plant investment in distribution facilities in Claiborne County owned by Kentucky Utilities Company, these figures being as of different dates, but all being in the year 1957?

A. Yes, sir, I have. That percentage was about 33.6 per cent.

Q. Paragraph 5 of the stipulation, quote:

"In 1957, the depreciated book value of plant investment in distribution facilities of electric distributors within the city limits of the towns of Tazewell and New Tazewell, Tennessee, was as follows:

"a. TVA distributor Powell Valley Electric Co-
[fol. 686] operative as of January 10, 1957) $8,532.00.
"b. Kentucky Utilities Company as of June 30, 1957, $68,674.05."

Now with relation to electric distribution facilities in the towns of Tazewell and New Tazewell, Tennessee, in 1957, depreciated book value of such facilities is so stipulated, what per cent was owned by Kentucky Utilities?

A. About 89 per cent, 89.

Q. I understand that you did not prepare these figures that have been stipulated to, but is the transmission line of Kentucky Utilities Company what would normally be termed a "distribution facility"?

A. No, sir.

Mr. Marshall: If we can recap three of these stipulations for the Court, with respect to numbers of customers on July 1, 1957, kilowatt hours of electricity in the two months surrounding July 1, 1957, and depreciated book value of plant investment and distribution facilities in the county during 1957, all of these figures relating to the county, KU in each instance was in excess of one-third.

The Court: That's exclusive of the operations in the two cities?

Mr. Marshall: I think it's inclusive.

The Court: Inclusive?

[fol. 687] Mr. Marshall: Inclusive. I think it includes everything in Claiborne County including what is in the city in each instance, customers, installation and kilowatt hours. Am I correct? That is my understanding of the figures.

Now in answer to the Court's question, in each instance I think the kilowatt hours and the customers within the cities are in evidence and could be subtracted to show what was outside. Would you like for us to get those figures available?

The Court: Yes.

By Mr. Marshall:

Q. Mr. Lewis, I preface this question because of the discussion with Mr. McCarthy a moment ago, principally as it relates to KU's position, its reason for being here and so forth.

Would this 69 KV transmission line that's been referred to be of value and the facility be of value to Kentucky Utilities Company if it loses its loads and revenue in Tazewell and New Tazewell?

A. No, sir, we would serve the remainder of our load down that corridor from our substation which is at Harrogate.

Q. We don't have a depreciated figure, but can you state an approximate cost that KU has in that transmission line? [fol. 688] A. Approximately $140,000.00, which includes the rebuilding of that line when we changed it from 34.5 to 69 KV.

Q. Last year that was done?

A. Last year.

Mr. Marshall: That's all.

Mr. McCarthy, wait just a minute.

I want to correct an error in our testimony. In the dollar figure read out of the stipulation as a plant investment, it was my understanding that the dollar figure of our facilities was distribution facilities and didn't include transmission line. I have just been corrected. The depreciated book value of our transmission line from Cumberland Gap down the corridor is included within the value of our facilities.

The Court: Yes, sir.

Cross-examination.

By Mr. McCarthy:

Q. How much is included for that transmission line?

A. I couldn't say, Mr. McCarthy, without reviewing——

Mr. McCarthy: Does counsel have that figure?

Mr. Marshall: No, I don't. The figure was supplied by the accounting department in Lexington at the time of the

[fol. 689] interrogatories, I think. I suppose we could get it for you if you want it.

Mr. Ardery: Didn't you just say it was worth a hundred and forty thousand?

Mr. Marshall: No. One is depreciated book value and the other is cost. In connection with cost, he said he did not know the depreciated book value. That's the reason he put the other figure in.

By Mr. McCarthy:

Q. KU has an interconnection agreement with TVA covering a number of locations, does it not?

A. I understand that it does, Mr. McCarthy. That is not my field of responsibility.

Q. I see.

A. Negotiating these interchange agreements.

Q. So you wouldn't know if you had a market for that transmission line if you decided to dispose of it or not?

A. Well, no, I couldn't say. No, sir.

Q. You just wouldn't know?

A. No, sir.

Q. All right. Will you refer to your Exhibit 26. What communities does KU claim a right to serve in Tennessee in the Eastern District, eastern area.

A. Several of these are not shown on the map. According to my memory, we serve Arthur; we serve——

[fol. 690] Q. Let me stop you there. Is Arthur shown in what you call a corridor there?

A. No, sir, it's just outside the corridor.

Q. All right. You have testified that New Tazewell is not?

A. Yes, sir.

Q. Would you point out New Tazewell to the Court so we can see how far out it is?

A. (Indicates on Exhibit as requested.) It's hard to see on this colored map. It's right here.

Q. All right. What other communities do you serve?

A. We serve Cumberland Gap, Harrogate, Shawnee, Tipprell.

Q. Are those shown in what you call a corridor there?

A. Without them being located on this map, Mr. McCarthy, and to this scale, I couldn't honestly say. I'll say that Cumberland Gap is shown here as being—it's not actu-

ally in the corridor, it's outside the colored area of Powell Valley service area.

Q. It's pretty hard to tell looking at that map whether it was in or out, isn't it?

A. No, sir, it's pretty clearly out here by some eighth of an inch.

[fol. 691] Q. That's assuming that this yellow line is intended to be here and wasn't intended to run along that state line?

A. Assuming that?

Q. Does that seem logical to you?

A. I couldn't comment where it was intended to run.

Q. You know where Harrogate is located, don't you?

A. Yes, sir.

Q. Isn't it a fact that it's shown outside of what you call a corridor there?

A. Harrogate is——

Q. You know——

A. —located to the right of this corridor. It's still outside of the colored area shown for Powell Valley. It's close to the line.

Q. Well, I would disagree with you on that. Point that out to the Court.

A. Here's Harrogate. This dot is the town of Harrogate. This one is Cumberland Gap.

Q. How about Shawanee, you know where Shawanee is located?

A. Yes, sir, it's located to the east of Harrogate, to the northeast, and it would be along—I would guess along this [fol. 692] line. I said the highways aren't shown and the dots of the other towns aren't shown. We have these dots——

Q. So in fact, what you call a corridor there has no relation to the area which you claim to serve?

A. No, sir, I would say to the scale this map is drawn that corridor indicates fairly clearly the area we serve, the general area.

Q. So you don't claim to serve New Tazewell or Harrogate or Shawanee?

A. I believe——

Q. Or any of those areas that are shown outside of that?

A. I believe to that extent this map is in error.

Q. Well in fact this is just a straight arrow down there which really isn't related at all to the maps that you have had here which you claim to show your service area, isn't that true?

A. All we intended to—all I intended to testify by this map was that there was—that it is a small-scale map, that there is a white corridor shown into Powell Valley's area which indicates that Powell Valley was not serving that area.

[fol. 693] Q. And you really don't know what that white corridor is intended to show at all, do you?

A. Judging from the white private utilities properties. It is not your distributors' property.

Q. Do you have the original of your Exhibit 36?

Mr. Marshall: Which is that?

Mr. McCarthy: That is the letter from Demerit with the attached map. I want to see the map.

By Mr. McCarthy:

Q. Now, Mr. Lewis, I show you a map entitled "Co-operatives, municipalities operating rural distribution lines in this area." This, I understand, is the original of your Exhibit No. 36?

A. Yes, sir.

Q. And that shows this KU area, as you have called it, as just drawn in there, freehand, doesn't it?

A. Yes, sir, with some care.

Q. And that is quite different from the Exhibit No. 36 which showed it in there in blue, is that not so?

A. This was a machine copy of this map. Red did not reproduce, and I think if you hold it to the light they will cover each other, the borders are shown.

Mr. McCarthy: We offer in evidence at this time as Exhibit No. 58 the original map of which the map which is part of Exhibit 36 is a copy.

[fol. 694] (Exhibit No. 58 was filed.)

By Mr. McCarthy:

Q. What is the date of this map?

A. The date is November 30, 1944. That is the date of the original drawing.

Q. Any revisions shown on there?

A. A general revision shown in June of 1945.

Q. Any revisions later than that?

A. No, sir.

Q. What does this base map purport to show?

A. This base map is entitled "Transmission and Rural Distribution Lines in Campbell, Claiborne, Union and Grainger Counties, Tennessee."

This description of it being co-operative and municipal operating rural distribution lines is a note to the left of the title block.

Q. So it shows the distribution lines of TVA distributors only?

A. Yes, sir.

Q. And what you have here is a 1945 map showing the lines of only the TVA distributors on which something has been drawn in freehand?

A. As KU area was drawn in apparently 1952 by Mr. Demerit, put on his background.

Q. It is on this map which shows the lines of co-opera- [fol. 695] tives as of 1945?

A. Yes, sir, and it shows the highways and towns and general layout of the area.

Q. Will you refer to your Exhibit No. 39, please. How many of the towns that you have shown on that exhibit are incorporated municipalities?

A. I couldn't say. I don't know how many are incorporated or how many are not incorporated.

Q. You have towns here with a population as small as 25, haven't you?

A. Yes, sir.

Q. West Clifty, Kentucky, is that incorporated?

A. I do not know.

Q. Let's come over to East Tennessee. How about Arthur, Tennessee?

A. No, sir, it is not incorporated.

Q. Harrogate?

A. No, sir, it is not incorporated.
Q. Shawanee?
A. No, sir.
Q. Tipprell?
A. No, sir.
Q. Mount Carmel?
A. I couldn't say about Mount Carmel.
Q. What do you say is the total population of these [fol. 696] towns?
A. I can't remember, Mr. McCarthy. I had the adding machine tapes yesterday and I don't have them here now.
Q. Do you know what the total population is of the area served by TVA power?
A. No, sir.

Mr. McCarthy: We have no further questions.

By Mr. Ardery:

Q. Mr. Lewis, let me ask you to refer again to this map, or the Exhibit No. 26, and, Mr. Marshall, if I may, let me borrow your copy that you withdrew and if you would let me use your glass again, please?
I believe, Mr. Lewis, you testified that as far as the area of Tazewell and New Tazewell were concerned that these maps were the same, is that correct?
A. As far as I could tell; yes, sir.
Q. Well, now, I would like to take the one that was withdrawn, which is the map of 1960. I believe the one you got in evidence there is 1958?
A. It is.
Q. And refer to the area of Tazewell and New Tazewell, right there.
If I understood it correctly you said that this map was very inaccurate but that it was accurate as far as Tazewell was concerned; is that correct?
[fol. 697] A. In as far as it shows this corridor which we serve and including Tazewell it is accurate.
Q. You said it was inaccurate because it excluded New Tazewell; is that correct?
A. Yes, sir, one of the reasons.
Q. Now put the glass on this map and tell me if that map does include Tazewell in the white corridor?

A. I would say it is closer to the line but——

Q. Doesn't our line cut right in the midle of it?

A. Cuts the left corner of it.

Q. Would you put it up and let the Judge see it with the glass?

A. Yes, sir, (showing the Court).

Q. With the Judge looking at it I would like to ask again, isn't it true that the line which shows Powell Valley service area cuts right through the middle of the town of Tazewell?

A. I would say it cuts closer to the left side of the square shown for Tazewell.

The Court: Where is the line?

The Witness: He is referring to this colored line, here.

Mr. Ardery: Can you see what I mean, Judge? I say that this yellow line is the Powell Valley area, and I say that [fol. 698] the yellow line cuts right through the center of the town of Tazewell.

The Court: What does the blue line represent?

Mr. Ardery: It is green.

By Mr. Ardery:

Q. Tell the Court what the green line represents?

A. The green line represents a transmission line.

Q. Let me ask you another question. You have said that map was accurate with respect to Tazewell despite the many other inaccuracies, what does it show as regards to a sub-station there?

A. It shows a triangle as a sub-station.

Q. Is the triangle colored?

A. Yes, sir.

Q. What color is it?

A. Colored green.

Q. What does the legend at the bottom of the map say about the color green?

A. It says the color green is the property of private utilities.

Q. So that map shows that the sub-station in Tazewell belongs to a private utility; is that correct?

A. According to the legend it does.

Q. So not only is the map inaccurate with regard to

other respects but it is inaccurate with regard to the town [fol. 699] of Tazewell itself, isn't it?

A. I say that, I will say that the town of Tazewell is shown in a closer position to the line then on the previous map.

Q. Well, that can be a point of disagreement.

A. Yes, sir.

Q. It is also inaccurate as it purports to indicate the sub-station, isn't it?

A. Yes, sir.

Q. Now, Mr. Lewis, is it your position that Powell Valley service area includes any part of the town of Tazewell or New Tazewell?

A. In what respect, Mr. Ardery?

Q. I am just trying to get, it seems to me that you were taking the position that the area within the corporate limits of Tazewell and New Tazewell were exclusive territory for KU.

A. I would take that position from my understanding of the July 1, or rather the August 6th, 1959 TVA Act. According to the way the towns grew into the service area, I believe we stated that they had some 30 customers in there as of July 1, and we have never challenged their right to serve those customers.

Q. Doesn't KU actually concede certain of the area inside the city limits of Tazewell and New Tazewell as being [fol. 700] properly the service area of Powell Valley?

A. We had conceded that in the past, Mr. Ardery, before this TVA Act of 1959.

Q. But you think the TVA Act actually gave you more territory in this Tazewell and New Tazewell area than you had prior to the enactment of that law?

A. It is my personal belief it does. I am no attorney.

Q. Let me refer to Exhibit 14 here which shows, according to Mr. Rowe and Mr. Osborne, I believe, what you call the agreement.

A. Yes, sir.

Q. And directing your attention to the part of this map that shows the towns.

If I understood the position of KU correctly the shaded area was KU territory and the higher area is Powell Valley territory; is that right?

A. Yes, sir, that was as agreed by Osborne and Rowe.

Q. Well, I thought it was your contention as also agreed by Powell Valley?

A. Well, as agreed by, say, the managers of Powell Valley and KU.

Q. Aren't there substantial areas outside the shaded areas on this map which are inside the incorporated city [fol. 701] limits of Tazewell and New Tazewell?

A. I would say without the city limits being shown, I would say this area through here where they had developed the eastern edge of the city is shown as outside that area, a place——

Q. About sweeping up like that?

A. It may be. I don't see the city limits line on here.

Q. Mr. Lewis, let me hand you a map of the presently incorporated city limits of the towns of Tazewell and New Tazewell and give you a chance to examine it and see if you have any quarrel with that map as being a proper indication of those city limits.

Mr. Marshall: What map are you referring to?

Mr. Ardery: This is a map that has not been put in evidence yet. This is a map that we have of the Tazewell and New Tazewell city limits.

A. Without comparing this map, I would say it is a fair representation, to the best of my ability to judge without comparing it to another map.

By Mr. Ardery:

Q. I direct your attention to a place where a road is going roughly north and another road turns off to the northwest, and ask you if as indicated on this map of Tazewell and New Tazewell that is not substantially inside the [fol. 702] city limits?

A. As indicated by this map it is.

Q. That as indicated on your Exhibit No. 14 that is Powell Valley territory, is that right?

A. Yes, sir.

Q. Can you see additional differences in the way the line—that comes from down about here and goes straight on up——

A. In that direction——

Q. Aren't there substantial differences in the total corporate boundaries of the two towns and the area, the shaded area shown on Exhibit 14?

A. Yes, sir, there are differences.

Q. As a matter of fact, this No. 14 does not even have the new road going through the two towns, does it?

A. I don't believe it does.

Q. How long has that road been there?

A. I can't recall.

Q. About 12 or 14 years?

A. I can't recall.

Q. It has been there longer than 10 years, hasn't it?

A. I believe so. These were geographical survey maps which were available at the time which evidently did not show the road and we used to described the boundary.

[fol. 703] Q. Let me ask you about another point.

You testified with respect to delivery of two checks at a joint meeting of councils of Tazewell and New Tazewell, one I believe in the amount of $1,967.00 for New Tazewell, and one in the amount of $1,823.00 for Tazewell; is that right?

A. I believe those were the figures.

Q. Would you take a pencil, please, and add those two figures.

A. The figures again, please?

Q. $1,967.00 and $1,823.00. What is the total?

A. $3,790.00.

Q. I believe it was your testimony that those checks represented three per cent of the revenues received from customers in those towns; is that right?

A. Three per cent of the revenues from residential and commercial customers within the towns.

Q. Well, Mr. Duncan testified that the revenues from the towns amounted to $178,000.00. Will you take a pencil and compute three per cent of $178,000.00?

A. $5,350.00.

Q. I get $5,340.00 but that is close enough.

A. That is correct, excuse me. $5,340.00.

Q. Now you say that the amount offered was $3,790.00 and three per cent of the revenues as testified to by Mr. [fol. 704] Duncan is $5,340.00. Now why the discrepancy?

A. There could be a number of reasons. This $3,790.00 was for the year 1962, as I recall, and Mr. Duncan's figures might have been for a later period or a current period.

One of the other reasons, Brooks Wood Manufacturing Company is a large customer. As an industrial customer his revenue would not be in this total. Any service to a municipality, governmental building or school, not being commercial or residential customers, would not be in this total.

That would be the reasons.

Q. Now as I understand it when you delivered these checks to the meeting, the joint meeting, you said that there were representatives of KU who said that there were no strings attached to these checks at all; is that right?

A. That is right.

Q. Was there any writing on the check other than enough to make the check a valid instrument?

A. The check had a stub attached to it which normally contains a description of what the check was for.

[fol. 705] Q. Wasn't there anything written on the check itself as a "for"?

A. Not on the check itself, no, sir.

Q. What was the "for" printed on the stub?

A. I can't recall the exact wording. I heard the discussion yesterday. On all such franchise checks, we normally put 1962 franchise payment, and in this case, if it were a perpetual franchise, it probably would have had a year date and it would have said "perpetual franchise payment."

Q. Didn't it say "for perpetual franchise"?

A. I can't recall the exact wording on the check.

Q. Can you say that it didn't say simply "for perpetual franchise"?

A. No, sir.

Q. Now you say that you got a franchise from Cumberland Gap, is that correct?

A. Yes, sir.

Q. Is it a city franchise or a county franchise?

A. It is a city franchise.

Q. Well now, if you need a city franchise for Cumberland Gap, why don't you need a city franchise for Tazewell and New Tazewell?

A. As I understand it, I don't remember that period, but

as I understand it, we purchased that franchise from a Mr. [fol. 706] Squires who had obtained it much earlier. We had the franchise with Cumberland Gap which was a ninety-nine year franchise. It was incorporated at the time, I believe, that we obtained the franchise from Claiborne County.

Q. Are you paying any other cities what you call franchise payments where you do not have a city franchise?

Mr. Marshall: Mr. Ardery, the question is are you paying any other cities where you do not have a city franchise. Of course the company's position is that we have a franchise effective in these cities.

By Mr. Ardery:

Q. I'm talking about a franchise granted by the city government. Are you paying this franchise payment to any city where the city government has not granted you a franchise?

A. You mean in Tennessee?

Q. Anywhere.

A. I couldn't say. I'm familiar with the ones in the mountain division, but as to the other divisions, I wouldn't know.

Q. Isn't it your contention that when you are operating inside of the city limits, that you need or you do not need a city franchise?

A. We need a franchise.

Q. I asked you a city franchise. Does the city govern- [fol. 707] ment have a right to control its streets and public passways?

A. I don't know, Mr. Ardery. In a case where we had a previous franchise with a county——

Q. Well, there wasn't anything written on this check that said this is a payment for a county franchise, was there?

A. No, sir. I remember that.

Q. It just said "perpetual franchise"?

A. Perpetual franchise.

Q. And you said that there were a couple of aldermen that wanted to accept that check, is that right?

A. I believe that is correct.

Q. Do you remember who they were?

A. No, sir, I couldn't give you their names.
Q. Was Mr. Arch Eldridge one of them?
A. Mr. Eldridge could have been?
Q. Don't you remember?
A. No, sir, I don't.
Q. You don't remember whether he was one of them?
A. No, sir.
Q. Well, Mr. Eldridge ran for re-election on the basis of extending this franchise to KU didn't he have that as a part of his platform?
A. Not to my knowledge.
[fol. 708] Q. Well, do you know whether he got elected or not?
A. No, sir, I don't believe he did.
Q. He got rather seriously defeated; didn't he, Mr. Lewis?
A. I don't remember that.
Q. And he was one of the few who was supporting KU's position with his own public there, isn't that correct?
A. I believe Mr. Arch Eldridge was friendly toward the company. I believe—other than that, I couldn't comment.
Q. Now let me direct your attention to the three cases where you say you got written contracts. This is the case of Mr. Brooks and Mr. Western and Mr. Shockley. If I understood you correctly, you said that you only made it a practice of getting written contracts where there was some special rate applicable, is that correct?
A. Or where an industrial customer is involved or a customer of any use other than ordinary residential or commercial in a store in town.
Q. If I understood you correctly, as regards these customers, you said the reason for the necessity of a written contract was because of a special rate for heating, is that correct, house heating?
A. For two of those customers.
[fol. 709] Q. I thought I understood you to say for all three of them.
A. No, sir. One contract was for Brooks Wood Furniture Manufacturing Company.
Q. Well, that's a general rate; it's not a special rate?
A. No, sir, it's a general rate to Brooks Wood.
Q. So if I understood you to say that the reason that you

needed written contracts was because it was a special rate, then I just misunderstood you, you didn't mean to say that?

A. I meant to say in the case of residential customers, we only get them in unusual cases such as home heating customers or when they have a rate other than the ordinary residential rate.

Q. Well, the rate to Mr. Brooks is called GP-30. What does GP stand for?

A. I think that refers to a general power rate.

Q. So that's just a regular rate, isn't it?

A. Yes, sir.

Q. And did I understand you that these rates were filed with the Tennessee Commission?

A. I think the rates were filed. The rate GP-30 is in our rate books for Tennessee, and I have assumed the other rates were filed.

[fol. 710] Q. Have all of the rates that you have charged in Tennessee been first filed with the Utilities Commission?

A. I think so.

Q. Well, it's your responsibility to know such things, isn't it, Mr. Lewis.

A. Yes, sir, we normally try to bill the correct rates to our customers and we receive that information from our general office when such rate filings occur.

Q. You haven't ever charged any rates or made any rate reductions in Tennessee that were not properly filed with the Commission?

A. It is not my responsibility to file the rates with the Commission, and I couldn't say whether they were properly filed or not.

Q. Have there been any offers of rate reductions made to special individuals in this area since this controversy arose?

A. Since the controversy arose?

Q. Yes.

A. There have been—I am advised from our general office that there have been new rates filed with the Commission which are optional rates, and we have attempted to contact every customer that would benefit by these optional rates and advise him of the situation.

Q. Were the two mayors people who qualified for this [fol. 711] special rate?

A. Yes, sir, I happen to know that they were.

Q. What was special about them?

A. They were using above 484 kilowatt hours a month.

Q. Did you communicate with everybody that was using above 484 kilowatt hours a month?

A. We have done our best. I would say some approximate—approximately one hundred such customers. I said 484 kilowatt hours a month because that is the exact point at which these rates break even. Above that for a certain range there's a few cents difference on one rate; below that there's a few cents difference on the other.

Q. Well, you do know both of the mayors got an invitation to a lower rate?

A. Yes, sir.

Q. And how many other people got that invitation, do you know that or not?

A. I would say between seventy to one hundred, approximately eighty.

Q. When was this rate filed?

A. That rate was filed, I believe we were advised to put them into effect on June the 1st of 1964. I wouldn't say for sure, Mr. Ardery. I believe that was the date.

Q. Does KU file its regulations and rules with the Ten-
[fol. 712] nessee Commission?

A. Yes, sir, I feel sure it does. I don't file them.

Q. By what authority do you file these rates, Mr. Lewis?

Mr. Rowntree: If Your Honor please, he testified that he himself didn't file them.

The Witness: I don't understand your question.

Mr. Rowntree: The witness testified that he did not file them.

By Mr. Ardery:

Q. Who would be the one whose responsibility it would be to file these rates?

A. It would be a department in the general office. I believe it's been handled by several individuals.

Q. You don't know who they are?

A. I know among them are Mr. Bradley and Mr. Skinner.

Q. Now I direct your attention to some questions Mr. Marshall asked you about the pictures. You were asked to

what facilities certain of the lines of the system were connected.

I would like to ask you if it isn't a common practice for utilities systems often to have parts of their system connected to the systems of other utility companies and not [fol. 713] physically connected to the system of the parent company at all?

A. I'd say it's not a common practice at all at voltages of 120 to 240 volts which are delivered into the home, no, sir.

Q. Doesn't KU have many parts of its system which are connected to the systems of other utilities and not connected physically to the main KU system?

A. I think it does have such interconnections. I couldn't say as to the number. And I don't know that it's not physically connected.

Q. Well, what about all of the lines that emanate into the Tazewell and New Tazewell area? Where are they connected?

A. The lines that emanate from where?

Q. That serve this area here. Aren't they all connected to Powell Valley substation?

A. Yes, sir, they are connected to the—the distribution lines are connected to Powell Valley substation.

Q. Isn't that correct?

A. Yes, sir.

Q. Well, I'm just seeking to find whether you are willing to carry this principle to its logical conclusions, and if I understand it, the principle that you were asserting was that because the lines of the cities were not physically interconnected; that somehow this kept it from being a city [fol. 714] system.

A. I don't think any utility engineer, Mr. Ardery, would call this twenty-four point system in some cases consisting only of a service drop a distribution system.

Q. But the fact that your lines are all connected to Powell Valley before they ever reach any other facilities of KU doesn't permit that same principle to be used in case of KU, is that right?

A. They are all connected—they come from Powell Valley station in that particular area, and then they are con-

nected together. The line runs continually from one customer to another.

Q. I say you can't get from KU to KU without going through Powell facilities, can you?

A. Through one transformer or through a transformer.

Q. Well, it's a substation, isn't it?

A. Yes, sir.

Q. Now when these people were seeking service from the city system or from Powell Valley or anyone other than KU, did you get any call from any of them directing you to remove your service?

A. Did I get such a call?

Q. Did the KU office in the mountain division get any such calls?

[fol. 715] A. The KU office at Tazewell had such calls.

Q. How many did it have?

A. I can—I don't know how many of these people made these requests by telephone or how many—who made them in person. A few of them, I understand, stopped Mr. Pressnell and asked him to do this, but the list of twenty customers that I have here, I have shown that we—everyone except Cope's Service Station requested service to be disconnected, and Cope's was——

Q. Then that is the individual power used requested that service be disconnected?

A. Yes, sir.

Q. So these requests came from the individual power users; they didn't come from TVA or Powell Valley or the city councils, did they?

A. We had requests from Mr. Stanifer who I understood at the time was acting for the city as city attorney to disconnect service at the Skyview Restaurant and at the Teacraft Marine Supply.

Q. Did you have any communication from the city councils requesting changeovers of service?

A. No, sir, not from the city——

Q. Did you have any requests from Powell Valley requesting that you take your service off of any of these houses?

[fol. 716] A. No, sir.

Q. Did any representative of TVA ever ask you to disconnect KU service?

A. No, sir.

Q. Mr. Lewis, how long did you tell me you had been head of the mountain division?

A. I am not head of the mountain division. I am assistant division manager.

Q. All right, excuse me.

A. I've been there since September of 1961.

[fol. 717] Q. In that time has KU ever refused to provide service to anybody who requested it in this Claiborne County area?

A. To my knowledge it hasn't, unless it would have—no, sir, I can say to my knowledge it hasn't.

Q. It could have happened but if it did you don't know about it?

A. If it happened I don't know about it.

Q. Mr. Lewis, I refer to your map that is shown on the board, which is Exhibit No. 24 which has green dots on it indicating service from either Powell Valley or the city systems. How many of those green dots are there on that map?

A. The green dots do not indicate service from either Powell Valley or the city. We attempted to show the customers in red rectangles which were buildings served by us. We intended for the map, for the green circles to indicate the principal, well, chiefly—it could have a city customer among them. Yes, sir.

Q. How many customers are there now located in the corporate limits of the two cities who are either customers of the cities' systems or Powell Valley?

A. How many customers?

Q. Yes.

A. According to the previous testimony or this map?

[fol. 718] Q. I am just talking about right now. I am not talking about July 1, 1957.

A. I had a figure as of May 25, 1964.

Q. What is that figure?

A. The figure was supplied, I believe, in the interrogatories and they had 150 customers in the two towns and we had a total of 778.

Q. Now just once more so that I can understand it, is it your contention that all this territory inside the corpo-

rate limits of the two towns as the corporate limits are now located is exclusive KU territory?

A. Again, obviously, we previously agreed for Powell Valley to serve some customers in preparation of this map. It is my personal belief that according to the 1959 TVA enabling Act, it would be exclusively our territory other than those locations which they served on July 1, 1957.

Q. Is there a new factory located between the two towns?

A. The new factory?

Q. Yes, is there a new factory under construction?

A. There is a new factory under construction inside the town of Tazewell.

[fol. 719] Q. What about that factory, is that supposed to be a KU customer or supposed to be a Powell Valley or the cities' customer?

A. I think it should be a KU customer.

Q. Do you know who is supplying the power now for construction?

A. I understand that Powell Valley is supplying the power.

Q. Do you know how many people are going to be employed in that factory?

A. No, sir, I don't.

Q. Are there several hundred?

A. I couldn't say. I don't know.

Q. Do you know that one of the grounds for the locating of that plant there was that they must receive TVA power through one of its distributors?

A. No, sir, I did not.

Q. You don't know that they would not have come there and will not stay there if they have to have KU service?

A. No, sir, I did not know that.

Q. Let me refer to an interrogatory that was propounded to KU Company—it is on page 6 of its interrogatories and it is Interrogatory No. 10, and it says:

"Do you contend that the area and customers within the municipalities of Tazewell and New Tazewell, Tennessee, [fol. 720] to which Powell Valley was selling and distributing electric power on or before July 1, 1957 are outside the TVA area as described in paragraph 10 of the complaint, and if so state the basis of your contention?"

Answer: "KU does not in this action contend that the customers within the municipalities of Tazewell and New Tazewell to which Powell Valley was selling and distributing electric power on July 1, 1957 are outside the TVA area as described in paragraph 10 of the complaint."

Do you have any quarrel with that?

A. I obviously couldn't. It is there in writing.

Q. In your theory what would happen if the town lines were extended, as they have been in the past, to take in customers that are presently on Powell Valley's lines?

A. If the city lines——

Q. Yes, sir.

A. —were extended to take in customers served by Powell Valley?

Q. Yes, what is your theory of that situation?

A. I don't know, Mr. Ardery. The city has never made it clear whether they intend to acquire the property of Powell Valley within the city limits or not, or whether they just intended to acquire our property.

Q. Let's just turn our attention to the question of what happens to the TVA service area as TVA power may go [fol. 721] through its distributors, be they the city system or be they Powell Valley.

I will ask you again, suppose the municipalities extend their line to include lines of Powell Valley and customers of Powell Valley, what is your theory of the effect that this will have upon the service area of KU, if any?

Mr. Marshall: If the Court please, these are all legal questions, legal interpretations of the Act, and so forth, as to which Mr. Lewis is not really the company spokesman.

If Mr. Ardery wants to get Mr. Lewis' personal opinion on the TVA Act in these situations, I think that is all right and we don't object, but I do want to point out that Mr. Lewis does not speak on law matters for KU Company.

Mr. Ardery: My comment is that he is the assistant head of the Mountain Division. It would seem to me that he would know, or should know, what the service area of KU is, and I am simply trying to get the position of KU as to how this situation may be affected by events which are very likely to happen in the future.

A. We have considered our service area as this area shown on the map, and it is my understanding that this trial is to determine the matter of how that area will be [fol. 722] changed or might be changed.

Mr. Ardery: That is all. Thank you.

Redirect examination.

By Mr. Marshall:

Q. Mr. Lewis, the 1958 TVA map that has been discussed, a pretty small scale map, without regard to what that map may show, what is the fact as to who supplies all the electric service to Cumberland Gap, Tennessee?

A. Kentucky Utilities supplies all the electric service to Cumberland Gap, Tennessee.

Q. What is the fact as to who supplies all of the electric service in Arthur, Tennessee?

A. In Arthur, I wouldn't make a conclusive statement. I don't know whether the lines of Lafollette come near that area or not, and since it is not incorporated, as mentioned before, I couldn't say.

We serve most of Arthur.

Q. Do you have some map which would show that that is already in evidence?

A. We have that county facilities map of 1956.

Q. Let's take a look at that then.

This map only shows KU facilities and does not show others. Does it show KU's distribution system as extending from the transmission supply on the east through Arthur to points on the west?

[fol. 723] A. Yes, sir.

Q. Who supplies the electric service to Harrogate?

A. Kentucky Utilities.

Q. Who supplies the electric service to Shawanee?

A. Kentucky Utilities.

Q. And it has already been testified that as to some eight, possibly ten, customers in 1957 that KU supplies the remainder of the service in New Tazewell?

A. Yes, sir.

Q. Mr. Ardery showed you a map and discussed city

boundary lines with you. I hand you back the same map. What is the date of that map?

A. It is March 30, 1964.

Q. The defendants have also furnished us another map, a photocopy of which is filed as Exhibit No. 25, which map undertakes to show city boundaries of New Tazewell and Tazewell referred to as corporate limits on the map as of July 1, 1957.

Could the Court look at these two maps and note the difference in the city boundaries on the two maps?

A. They are the same scale.

Q. Now, most of the area that Mr. Ardery referred to, or a number of them, were added obviously, comparing these maps, by annexation between July 1, 1957 and the date of the second map, March 30, 1964; is that a correct [fol. 724] statement?

A. Yes.

Q. There are substantial differences in the boundaries as shown on the defendants' two maps?

A. Yes, sir.

Q. And the 1957 map of the defendants, a copy of which has been filed as Exhibit No. 25, is the map from which you were testifying when you described to the Court how the customers of Powell Valley in Tazewell on July 1, 1957 were all grouped along the eastern outskirts and in New Tazewell on that date except for one customer at the extreme west, were all group in a tag of the city again on the eastern boundary of New Tazewell?

A. Yes. This is the map.

Q. Do you know that the revenue figure that Mr. Duncan testified to from the annual revenues from the towns of Tazewell and New Tazewell, the $178,000.00 figure Mr. Ardery referred to, was as of the twelve months ending August 31, 1964; have you heard that in discussion?

A. No, sir, I hadn't.

Q. But you did point out that it might be for a different year than the basis of the computation of those two checks?

A. I would assume it would be for a later year.

Mr. Marshall: I think that is all.

[fol. 725] Mr. McCarthy: That is all.

(Witness excused.)

The Court: Take a recess.

(A short recess was had, after which the following proceedings were had.)

[fol. 726] The Court: Gentlemen, you may proceed with your witness.

CLARENCE PRESSNELL, a witness called by and in behalf of the Plaintiffs, after having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Rowntree:

Q. What is your name, sir?
A. Clarence Pressnell.

The Court: Who, I didn't get it.
The Witness: Clarence Pressnell.
The Court: How do you spell that?
The Witness: P-r-e-s-s-n-e-l-l.
The Court: Pressnell.
Mr. Rowntree: Clarence Pressnell.
The Court: Pressnell, all right.

By Mr. Rowntree:

Q. Now, Clarence, speak up real loud so these gentlemen over here can hear you.
Where do you live?
A. Tazewell, Tennessee.
Q. Are you employed by the Kentucky Utilities Company?
A. Yes, sir.
[fol. 727] Q. What is your job?
A. Electrical serviceman.
Q. In what vicinity?
A. Tazewell and New Tazewell.
Q. How long have you been employed by Kentucky Utilities?
A. A little better than sixteen years.

Q. What did you do before that employment?

A. I was a farm boy.

Q. A farm boy?

A. Yes; sir.

Q. What has your job consisted of over those sixteen years that you have been with the company?

A. In the beginning I was groundman, meter reader; went from that, from serviceman, serviceman doing service work, line work.

Q. And what is your job today?

A. Serviceman doing service and line work.

Q. Now on October 30, 1963, did you observe anything peculiar in the electricity business there in Tazewell or New Tazewell?

A. Yes, sir, at two or three different locations, I discovered a utility truck and crews working that I wasn't familiar with.

The Court: What date was that?

[fol. 728] The Witness: October 30th.

The Court: What year?

The Witness: 1963.

By Mr. Rowntree:

Q. Were you generally familiar with the Powell Valley crews in that vicinity?

A. Yes, sir.

Q. Were these Powell Valley men that you saw that day?

A. No, sir, not local.

Q. Were they Kentucky Utilities men?

A. No, sir, they were not.

Q. What were they doing when you saw them there?

A. They were digging holes, setting poles, hanging transformers.

Q. Did you see them in the vicinity of Teacraft Marine, Skyview Restaurant, Cecil Hurst residence that day?

A. Yes, sir.

Q. What did you do when you saw these men?

A. I checked with them to see what they were doing.

Q. Don't state anything that they said.

A. And then later I contacted my superiors.

Q. And what did they tell you to do?

A. They told me to keep daily logs on the events that I [fol. 729] saw happening.

Q. And did you keep a daily log from that point on?

A. Yes, sir, I did.

Q. Now what did you observe on the next day with respect to these three locations, the Teacraft Marine, the Skyview Restaurant, and the Cecil Hurst house?

A. That poles had been set, transformers hung and services run to our customers.

Q. Had Kentucky Utilities gotten a request for discontinuance of service at those three locations?

A. Yes, sir, we had got requests.

Q. What did you do when you got that request? Did you receive any instructions?

A. I did. I contacted Mr. Smith and Mr. Lewis, and they said that they would talk with their attorneys and advise me what to do.

Q. Who made the request for discontinuance?

A. Billy Stanifer called the office on those three.

Q. Who is he?

A. The two Tazewells' city attorney.

Q. City attorney for the two Tazewells?

A. Yes, sir.

Q. Did you make a disconnection on those three places? [fol. 730] A. No, sir, I did not.

Q. Did somebody?

A. Yes, sir.

Q. How did they make the disconnection?

A. By removing our meters and cutting our service loose at the weather cap.

Q. Did you ever recover the meters and if so, where?

A. Yes, sir, I recovered them later by going and inquiring for them. One was in a pumphouse and one was in the back of the restaurant under a table, one was inside another business place on a table.

Q. Mr. Pressnell, will you describe the nature of the facilities that were installed by this crew at those three places?

A. At Skyview Restaurant, it required installing a transformer and a service drop.

Q. To the restaurant?

A. To the Skyview Restaurant.

Q. Was that transformer installed on an existing pole?

A. Yes, sir, that pole—that transformer was installed on an REA existing pole.

Q. You mean a Powell Valley pole?

[fol. 731] A. Powell Valley Electric Co-op pole.

Q. All right. Now what facilities were needed for the Cecil Hurst house and where is that located with respect to the restaurant?

A. Kindly a northern direction from the restaurant. It required service pole, service drop, a span of service drop going back and tying into the same transformer that the restaurant was served with.

Q. Now what about the Teacraft Marine, what facilities were needed there?

A. Just a service drop from an existing Powell Valley Electric Co-op pole.

Q. Now did you get instructions after that with respect to what to do when these requests came in for disconnections from that point on?

A. Yes, sir, word from Mr. Smith and Mr. Lewis to go ahead and disconnect services as they were requested in a normal manner.

Q. And did you get a considerable number of requests after that?

A. Fifteen.

Q. Had you had any experience of getting requests in that kind of numbers before this day of October 30?

A. No, sir, I had not.

Q. Were these—did these requests start coming in after [fol. 732] you saw this crew there on October 30?

A. Yes, sir.

Q. On October 31st and the following days, did this crew continue to work in that vicinity, Tazewell and New Tazewell?

A. Yes, sir.

Q. How many days did that crew stay there, approximately?

A. I don't know the exact days, but quite sometime.

Q. Approximately how many days?

A. They continued working a month or over in this area.

Q. In this area?

A. Yes.

Q. How long did they work there disconnecting your customers or installing facilities at places where KU had previously served?

A. Up until about November 7th.

Q. Did they do any more work with respect to connecting up KU customers after November 7th?

A. Not that I knowed of.

Q. As these requests for disconnection came in, did you proceed to make disconnections?

A. Yes, sir.

[fol. 733] Q. How many customers of Kentucky Utilities were disconnected in this manner in each of the two towns?

A. Fifteen in the two towns.

Q. Well, how many were disconnected in Tazewell and new service provided by this crew?

A. Was disconnected by me?

Q. You say that there were fifteen customers disconnected by you altogether?

A. Yes, sir.

Q. All right. Now how many customers in Tazewell were changed over to another supplier by this crew overall during this period of time?

A. Nine in Tazewell.

Q. And how many in New Tazewell?

A. Nine in New Tazewell.

Q. Now what did this crew do during that period of time besides work on installations to install new service to these Kentucky Utilities customers?

A. They were working on Powell Valley Co-op lines, running north out of Tazewell along 25-E, convering single-phase to three-phase.

Q. Did this job go on a substantial period of time?

A. Yes, sir, it did.

Q. Was that a Powell Valley line?

[fol. 734] A. Yes, sir, it was.

Q. And this was the same crew that was doing the work on the Kentucky Utilities customers switchover?

A. Yes, sir.

Q. Now where did—with respect to these other fifteen customers that you actually made the disconnection on, describe how you would make the disconnection when you got one of these requests.

A. We would remove the meter from the socket, place plastic sleeves on the meter contacts, place them back in the meter socket and seal the meter to the socket.

Q. So the meter was left where it was before?

A. Yes, sir.

Q. Now after this crew made the disconnections on these fifteen other customers besides the first three, was your meter removed from that receptacle by anyone?

A. Yes, sir.

Q. How did you relocate these meters and recover them?

A. By going by and asking for them and finding them in different locations. By going by and inquiring for them, asking for them.

Q. Did you finally recover all of them?

A. Yes, sir.

Q. Now, Mr. Pressnell, how many of all eighteen cus-
[fol. 735] tomers that were taken, how many required just a simple service drop from a Powell Valley pole to the house or building?

A. Four.

Q. Do you know how many transformers had to be installed on this system?

A. Thirteen transformers all told. Part of them was transformers of the Co-op's that the size was increased from I believe it was three the size were increased. Others were new transformers.

Q. By that do you mean that there were transformers before that on Powell Valley poles that had to be increased in size?

A. Yes, sir.

Q. Were any transformers newly installed on existing Powell Valley poles?

A. Yes, sir.

Q. How many?

A. Three.

Q. Now that three and the other three, the increase in size, were those six included in the thirteen transformer total?

A. Yes, sir.

Q. How many new poles had to be installed on this system?

[fol. 736] A. Fifteen.

Q. Now were all of these customers connected to Powell Valley lines?

A. Yes, sir.

Q. By these facilities that you have given the number of?

A. Yes, sir.

Q. Did you observe any markings on the poles that were installed?

A. Yes, sir, in Tazewell, they had a little tag similar to the Co-op tags on their poles, only in Tazewell they said "TA" and a number; in New Tazewell, it said "NT" and a number.

Q. Now did you continue to make recording in your log of the events that transpired after this crew left, after November the 7th?

A. Yes, sir, I did.

Q. How many extensions and service points were involved in the later work around Tazewell by Powell Valley and Tazewell and New Tazewell?

A. Seventeen extensions and service points consisted of forty-three poles.

Q. Now this is work that was done by the Powell Valley crew that you saw?

A. Yes, sir.

[fol. 737] Q. All right. Forty-three poles you say?

A. Yes, sir, it consisted of forty-three poles and——

Q. Do you recall what the longest extension line was?

A. There was a thirteen pole extension.

Q. What did that lead to?

A. Where did that lead to?

Q. Yes.

A. That led out of the county into the city of New Tazewell.

Q. Do you recall what customers were served then?

A. Cotton Grubbs' residence; Bill Lewis' residence.

Q. Two of them?

A. Yes.

Q. They built a thirteen——

A. New houses being built.

Q. They built a thirteen-pole extension to get to these two houses?

A. Yes, sir.

Q. Now state whether or not this extension was placed

through territory that has heretofore been served exclusively by Kentucky Utilities?

A. Yes, sir, it was.

[fol. 738] Q. Was this done after the bringing of this lawsuit?

A. Yes, sir.

Q. Was was the next largest extension that was installed in Tazewell and New Tazewell?

A. An eight-pole extension in Tazewell, running along the main highway of Tazewell in parallel with KU's facilities which was just across the highway.

[fol. 739] Q. Now, do you recall where that line led to?

A. That led to the Hardin property which KU had served. I know of a building at an earlier date. Served them until 1963.

Q. Was that building demolished?

A. Yes, sir, it was torn down.

Q. A new building put in its place?

A. And a new building constructed.

Q. Did KU disconnect when the old building was torn down?

A. Yes, sir. But at the request of the owner we removed our service at that place.

Q. Is that Mayor Hardin's property there?

A. His or his father's.

Q. And when this new building was built did this eight-pole extension run into there and serve that building?

A. Yes, sir.

Q. Was this right across the street from the KU line?

A. Yes, sir.

Q. Was that done after the bringing of this lawsuit?

A. Yes, sir.

Q. Will you state whether or not Harrell and White was served off of that line?

[fol. 740] A. Yes, sir, Harrell and White was served off of that line which KU had served at this location to a building that was destroyed by fire.

Q. Now will you state whether or not the Powell Valley crew built this eight-pole extension?

A. Yes, sir, the Powell Valley built that extension.

Q. Are the two buildings, the Hardin building and the

Harrell and White property, are they customers of the town?

A. According to the list they submitted they are customers of the city.

Q. Now are you acquainted with anything that went on with respect to the Wade Honeycutt property?

A. Yes, sir. In November of 1963 Mr. Honeycutt requested service of KU and was given it and continued service until June of this year.

Q. Did you get a request to disconnect in June of 1964?

A. Yes, sir.

Q. Had he been billed up to that time by KU?

A. Yes, sir, he had.

Q. What had you observed before that time and when with respect to somebody else giving service to that property?

[fol. 741] A. It was called to my attention on April 22nd or '3rd that one of our former customers had moved into this location, and in checking I found that the co-op had built a one-pole extension to a recently built four-pole extension and had given Lawrence Muncey service at this location.

Q. Is he the old customer of KU that moved into that building?

A. Yes, sir.

Q. And when was this done; when was this new service provided?

A. It was done between April 21 and April 27th of 1964.

Q. And is Lawrence Muncey a customer of the municipalities or is he a customer of Powell Valley?

A. They do not show him as a city customer.

Q. As a municipal customer?

A. No, sir, they don't.

Q. Is there anyone else he could be a customer of besides Powell Valley?

A. No, sir.

Q. Are you acquainted with a trailer that was moved in one of these two towns?

A. Yes, sir. There is a trailer in Tazewell that talked to me about service before locating his trailer. Then later he set his trailer and Jack Cook and myself dropped service [fol. 742] into the pole at the trailer, and then later there

was a four-pole extension built by the co-op and gave him service. And the trailer owner told me it would be there less than 12 months.

Q. How many poles were put into the trailer?

A. Four poles and a transformer.

Q. Was any other customer served off of that that you observed?

A. No, sir.

Q. Did you say the trailer was going to be there for one month?

A. Less than 12 months.

Q. Was that done after this lawsuit?

A. Yes, sir.

Q. Was that a Powell Valley line?

A. Yes, sir.

Q. Was that territory that previously was served exclusively by Kentucky Utilities?

A. Yes, sir.

Mr. Rowntree: That is all.

Cross-examination.

By Mr. Pedersen:

Q. Mr. Pressnell, these trucks and things that were working around there, did they have any names on them; any names printed on the sides of the vehicles?

[fol. 743] A. At what locations?

Q. That were doing this work that you are talking about, disconnecting KU customers?

A. Yes, sir.

Q. Were any of them vehicles of the Tennessee Valley Authority?

A. No, sir.

Q. Were any of the men employees of TVA?

A. That I don't know for sure.

Q. You are not saying that any of them were; is that correct? You are not saying that any of TVA's men did any of it at all, is that correct?

A. No, sir, I wouldn't say they did or didn't.

Q. But you saw no TVA equipment and you saw nobody around there having any TVA badge on or anything?

A. No, sir.

Mr. Pedersen: That is all.

By Mr. Ardery:

Q. Mr. Pressnell, with respect to that trailer, didn't Kentucky Utilities put service on a pole with the intention of providing service to that trailer without ever having a request for service?

A. No, sir.

Q. You did have a request for service from the owner of the trailer?

[fol. 744] A. Yes and no.

Q. I can't win. Tell me about it, sir.

A. He talked to me if I could give him service, not exactly this specific location but in that area. I told him yes, sir, I could.

Q. He never made an application to you for service, did he?

A. No, sir.

Q. Do you know whether he made an application to the city for service?

A. No, sir.

Q. Without regard to this controversy, Mr. Pressnell, what would your normal procedure be if a customer of KU called you and asked to disconnect?

A. What would the normal procedure be?

Q. Yes, if we did not have this fight going and, say, I was a customer of yours somewhere in Claiborne County and I called you and said I would like to have my service disconnected, what would happen?

A. I would disconnect you just like I did those customers.

Q. With regard to the Sky View Motel and Cecil Hurst residence, did not Cecil Hurst himself make request of you to disconnect that service?

A. Yes, sir, he did.

[fol. 745] Q. He was very emphatic about it too, wasn't he?

A. Sir?

Q. He was very, quite emphatic about it, wasn't he?

A. Yes, sir.

Mr. Ardery: That is all.

Mr. Rowntree: That is all, Mr. Pressnell. Come around.

(Witness excused.)

Mr. Rowntree: If your Honor please, we would like to read a deposition at this time. The deposition of Mr. Ralph B. Miner.

RALPH B. MINER, called a witness by the plaintiff by deposition, deposed as follows:

(The deposition was read by Mr. Rowntree and Mr. Welch.)

"Direct examination.

"By Mr. Rowntree:

"Q. What is your name, sir?

"A. Ralph Miner.

"Q. Where do you live, Mr. Miner?

"A. I live near Jonesville.

"Q. Is that Virginia?

"A. Jonesville, Virginia, yes, sir.

[fol. 746] "Q. What is your position?

"A. I'm manager of the Powell Valley Electric Co-operative.

"Q. And how long have you been in that position?

"A. Since about the first of May in '62, 1962.

"Q. And what was your position before that?

"A. Well, immediately before that I was a superintendent.

* * * * * * *

"Q. How long did you hold the job of superintendent and did you——

"A. About four years, roughly.

* * * * * * *

"Q. Apparently you worked in other areas besides the Jonesville area?

"A. Oh, yeah.

"Q. Did the co-operative have more than one superintendent, or were you the only superintendent?

"A. Well, we didn't have job classifications, but I suppose that we had a superintendent at Tazewell. He was referred to at times as local manager and different things, but he was the superintendent, I'd say.

"Q. Who was that man at Tazewell?

"A. Mr. Rowe.

"Q. Mr. Harry Rowe?

[fol. 747] "A. At that time; it's Mr. Sandefur now.

"Q. What is Mr. Sandefur's full name?

"A. Earl Sandefur.

"Q. Is he a resident of Tazewell or in that vicinity?

"A. He lives in that vicinity; he doesn't live in the town.

"Q. What is your duties as general manager of the co-operative? You just have administrative head of the operation, I take it?

"A. Yes, sir, I'm responsible for coordination of the organization, the—I help the Board with any planning that I can, recommendations, responsible for the personnel of the co-operative.

"Q. And what was your duties as superintendent? Is that an engineering function, or what was it?

"A. Well, that's supervision of a group of operations personnel, supervision of certain construction. I did part of the surveying, I drew some work orders—well, in fact, I drew all of the work orders for my section or division.

"Q. Sort of an operational function?

"A. It would be more of an operational function, yes, sir.

"Q. Is Powell Valley Electric Co-operative a Virginia [fol. 748] corporation?

"A. Yes, sir.

"Q. Is it organized under the Rural Electrification Act of Virginia, Rural Electrification Co-operative Act of Virginia?

"A. I'm afraid I couldn't answer that, because I'm not too familiar with the—I've seen the incorporation papers, but that's about as much as I can say about it.

"Q. Do you have a copy of the charter here so we could see——

"A. Yes, sir, we do have.

. . . . . .

"Q. I take it that the co-operative has a Board of Directors?

"A. Yes, sir.

"Q. And it has a membership, do you have members of the co-operative?

"A. Yes, sir.

"Q. And how are members selected? What is the general position of a member in the co-operative? How does he come in, and what is his rights as a member? Can you give us a general idea of the position of a member?

"A. Well, he signs an application for membership and pays a five dollar membership fee. Then the Board accepts him generally, or he can be accepted by an annual meeting [fol. 749] of the members of the co-operative, but the Board does have the right, I think, to accept him. Then he has the right to vote in the election of directors to decide who shall be a director and who will operate the co-operative in that respect.

"Q. That's done at an annual meeting?

"A. At an annual meeting of members.

"Q. Does the board select the officers?

"A. They select the manager.

(The charter was handed to counsel.)

"Q. In reading from the charter, which has been produced, I observe that these incorporators do, quote:

> '"Do hereby associate themselves to establish an electric co-operative under and by virtue of Chapter 159A of the Code of Virginia, 1936, under the co-operative name hereinafter mentioned."'

As an electric co-operative thus chartered, were you eligible for REA loans under the Federal Act?

"A. Yes, sir.

"Q. And did you obtain loans from the REA?

"A. Yes, sir.

"Q. I have here a certified copy of indenture between Powell Valley Electric Co-operative and Dominion National Bank as Trustee, recorded in Trust Book 70, page 492-505, in the Register's office, Claiborne County, Tennessee. [fol. 750] Do you recognize that as being the mortgage

instrument or trust deed securing loans received from the REA?

A. Now what was the question?

"Mr. Rowntree: Read the question.

"(The last question was read by the reporter.)

"The Witness: Yes, sir."

Mr. Rowntree: I would like to file this as Exhibit No. 59.

(Exhibit No. 59 was filed.)

[fol. 751] "By Mr. Rowntree:

"Q. Now where does Powell Valley Electric Cooperative receive its power from? From what source does it obtain power?

"A. From TVA.

"Q. All of it?

"A. Yes, sir. I'll have to qualify that. We receive it through KU at Tazewell and from Old Dominion Power Company at Stony Creek, but we pay TVA for it all. It's all on one bill.

"Q. It becomes TVA power when you draw it?

"A. As far as we are concerned, it is TVA power.

"Q. Now does the cooperative have operations in Tennessee?

"A. Yes, sir."

Mr. Rowntree: Drop down to line 21, on page 12.

"By Mr. Rowntree:

"Q. In what counties in Tennessee does Powell Valley Electric Cooperative serve customers?"

Mr. Rowntree: Turn over to the next page.

"The Witness: Hawkins, Hancock, Grainer, Union, Claiborne, is that five?

"Mr. Cridlin: That's right.

"By Mr. Rowntree:

"Q. Now were you serving all of those counties in 1957, [fol. 752] July 1st?

"A. Yes, sir."

Mr. Rowntree: Turn to page 27, the third line.

"Q. We included in Mr. House's deposition the contracts with respect to the tri-party agreement, and do you recall, Mr. Miner, that there was an agreement between Powell Valley and Kentucky Utilities that was entered into approximately that same time concerning the service to customers by one of the two of the other——

"A. In addition to the tri-party agreement?

"Q. Yes, sir.

"A. I'm not so sure that I did.

"Q. I believe it was Mr. House's exhibit 6 which we filed the agreements. Do you recall the agreement letter entered into in 1952 concerning the service to customers by either Kentucky Utilities or by Powell Valley which customers were being served by the other?

"A. Well, I'm not too sure that I recall it.

"Q. Well, you do remember, do you not, that there was an agreement in 1952 to the effect that Kentucky Utilities would not serve a customer of Powell Valley, and Powell Valley would not serve a customer of Kentucky Utilities?

"A. Yes, sir, I think I recall that.

"Q. Mr. Miner, do you recall that there were certain dis- [fol. 753] putes that arose after 1952 and before the 1958 agreement between Powell Valley and Kentucky Utilities concerning who would serve new customers in the Tazewell-New Tazewell area?

"A. Well, I know by seeing some of the correspondence and things that there were conflicts.

"Q. And do you recall this House Exhibit 5 in which there are listed a number of different disputes that arose and the arguments of KU and the arguments of Powell Valley with respect to those disputes?

"A. I recall having seen this, yes, sir.

"Q. And do you recall that there was developed a territorial agreement to more broadly cover the situation to take care of such disputes as that, which agreement was entered into in 1958?

"A. Well, again I've seen the agreement.

"Q. That was when you were superintendent, I take it, and not general manager?

"A. At the time this '58 letter was written?

"Q. Yes, sir.

"A. I suppose I was a service man at that time.

"Q. You weren't general manager?

"A. No."

• • • • • • •

"Q. Do you recall that there was such an agreement [fol. 754] entered into?

"A. I'll go back to my other answer; I saw the letter.

"Q. All right, sir. And do you recall that maps were prepared under that territorial agreement of 1958 to depict the territory of Powell Valley and the territory of Kentucky Utilities in the Tazewell-New Tazewell area?

"A. Well, I didn't have anything to do with preparing any maps.

"Q. Do you recall that there were maps prepared?

"A. I had a general knowledge that they were being—there was some work being done in this direction."

Mr. Rowntree: Now I would like to skip to the bottom of page 31, line 25.

"Q. Now when was your first contact with respect to the dispute in this case, the servicing of customers of KU in Tazewell and New Tazewell? Was it in connection with the April 12, 1962, meeting?"

• • • • • • •

"A. Well, every time you get out of a car in Tazewell or any time you are there, you are contacted by somebody about being served by—somebody raises cain because he didn't get served by Powell Valley. As far as contacts, informal contacts are concerned, every time that you are in the area, you are contacted.

[fol. 755] "Q. Well, this was back when you were superintendent of the Jonesville District, Jonesville area. I take it that Mr. Berry was general manager in 1962, was that right?

"A. Yes, sir, up until his death in '62.

"Q. Did he ask you to attend a meeting concerning the Tazewell-New Tazewell situation along about April, 1962?

"A. Yes, he did.

"Q. And did you attend that meeting at the TVA office in Knoxville—no, at Cedar Grove in Claiborne County?

"A. Yes.

"Q. Mr. Berry died the second night after that, I believe, is that correct?

"A. I believe he died the following night after that.

"Q. And you became general manager and have served as general manager since that time?

"A. Well, I was appointed coordinator for a couple of weeks or something like that, and then made manager.

"Q. You were the administrative head from that time on?

"A. From that time on, yes, sir.

"Q. Now I show you memorandum of that meeting of April 12, 1962. Do you recognize that as being notes with respect to that meeting?

"A. Yes, sir.

[fol. 756] "Q. Who prepared these notes?

"A. I think these were prepared partly by Mr. Berry and partly by myself.

"Q. Can you recognize where his stopped and yours began?

"A. Well, he had prepared this list of names, and as I recall had made some notes on some plain pieces of paper, and I transcribed a thing or two that he had and some notes that I had made over to here.

"Q. Do these notes conform to your recollection with respect to what happened at the meeting?

"A. Yes, sir."

Mr. Rowntree: We file that as Exhibit 60.

(Exhibit No. 60 was marked for identification and filed.)

"Q. Now I observe in this Exhibit 5 this language, Mr. Miner, quote:"

Mr. Rowntree: I think that we will read this whole exhibit, Your Honor. It would be better to read that into the record.

List of persons attending power meeting at Cedar Grove, New Tazewell, Tennessee, on April 12, 1962. There are

listed the names of those in attendance, including representatives of TVA, Mr. Reidinger, Mr. Button, Mr. House; [fol. 757] the representatives of Powell Valley, Mr. Harry Rowe was there, Mr. Berry, Mr. Miner; and councilmen of the towns were present and the mayor of New Tazewell, Mr. DeBusk, the recorder of the town, Mr. Overton of the town of Tazewell, and Mayor Essary of Tazewell, and it reads, quote:

"The purpose of this meeting was for the members of the city councils of both cities to determine what, if any, steps could be taken to secure lower cost power in the two towns, Tazewell and New Tazewell.

"TVA personnel were present to let them know what their position was. PVEC people were present both to learn what they wanted and to let it be known what their position was.

"Apparently a territorial agreement between KU Company and PVEC is a big factor in this issue. This expires in year 1963.

"TVA asked the council members if they had determined whether or not the people wanted cheaper power. Ans. Yes, 90 per cent or above.

"Ques. TVA. Has any effort been made to buy existing system from KU.

"Ans. No.

"TVA statement. It is not feasible to operate a system of this size.

[fol. 758] "Councilmen: Would rather have PVEC or some other agency take over and own system eventually.

"Towns may buy system, get PVEC to operate for a time then sell.

"TVA instructions: Councils to approach both KU and PVEC, find out KU position on selling, PVEC on buying.

"(REA will not finance duplicate system, but will loan money to buy existing one is population under 1500—(This statement by Mr. Berry))"

"By Mr. Rowntree:

"Q. Now I observe in Exhibit 5 this language, Mr. Miner, quote:

> 'Apparently a territorial agreement between KU Company and PVEC is a big factor in this issue. This expires in January, 1963.'

"Do you recall that as being a big factor in that meeting?

"A. Well, I recall hearing that discussed in that meeting.

"Q. Who was discussing it mainly?

"A. Well, a good many of the people talked about this thing. I don't know how much they knew about it, but they——

"Q. Well, I mean people at the meeting, who was [fol. 759] talking about it, who brought it up?

"A. The members of the Chamber of Commerce apparently talked about this some and I'm not sure—It's been a long time ago, and I just make this—transcribed this or made this note. I'm not sure who talked about it at that time.

"Q. The Exhibit 5 also states on the second page, quote:

> 'TVA statement—it is not feasible to operate a system of this size.'

"I suppose the TVA representatives were talking about a system in Tazewell and New Tazewell.

"A. Yes, sir.

"Q. As a municipal system.

"A. I think so.

"Q. And the councilmen from the municipalities who were present in that second paragraph on that page stated that they would rather have PVEC or some other agency take over and own the system eventually.

"Is that what they expressed there?

"A. Well, at least that's what the note said; I suppose it was.

"Q. And there is a note at the bottom, at the end of this exhibit 5, quote:

> 'REA will not finance duplicate system but [fol. 760] will loan money to buy existing one if population under fifteen hundred'

"Was that expressed at the meeting?

[fol. 761] "A. Well, again it must have been. I don't recall the statement, the words, now except that the note has been made.

"Q. Then the third paragraph on that page states, quote:

'"Towns may buy system, get PVEC to operate for a time then sell.'

"Was that a proposal made at the meeting?

"A. Well, I would think that this wouldn't be a proposal. It looks like a statement of fact to me.

"Q. Would you say that that was discussed at the meeting?

"A. I would assume it was.

"Q. And when that statement says 'then sell', quoting, does that mean sell to PVEC?

"A. No, sir, as I recall that part, they could sell it to anybody they wanted to.

"Q. All right, sir. Then the statement in the fourth paragraph on that page states, quote:

'"TVA instructions: councils to approach both KU and PVEC—find out KU's position on selling—PVEC on buying.'

"Were those the TVA instructions at that meeting?

"A. Well, I'd say that wasn't a very good word, [fol. 762] 'instructions'. I think it was decided at that meeting that these people should appoint a committee possibly to approach KU and Powel Valley.

"Q. Of course KU was not at the meeting, was it?

"A. Not that I know of.

"Q. But Powell Valley was?

"A. Yes, sir.

"Q. And is it not true that Powell Valley expressed at the meeting the idea that they would buy the system?

"A. I don't believe so. I think Berry made some statement about operating, but I don't think he ever made any commitment of buying.

"Q. But it was discussed there with no final sort of a commitment or understanding about the buying part?

"A. Yes, this was discussed.

"Q. Now do you recall that you prepared some notes or memorandum concerning Tazewell and New Tazewell power situation giving a summary of your knowledge of that situation, number 55?

"A. Now what was the question?

"Q. Do you recall preparing these notes which I show you?

"A. Yes, sir.

"Q. On the second page of that at the top, it [fol. 763] states, quote; and this concerns the meeting of April 12, 1962, does it not?

"A. Did you ask a question, I'm sorry.

"Q. Yes. Does this language in this first and second full paragraphs on the second page pertain to the April 12, 1962, meeting?

"A. Yes, they do. I didn't realize you had asked a question.

"Q. Quoting:

> 'They were told by TVA that a system of this size was not feasible to operate on its own. They replied they did not intend to operate it if they could lease it to a TVA distributor. They asked Mr. Berry if the co-operative could buy the system. He replied that no loan funds would be available to duplicate the system, but it might be possible to borrow money to buy it if it were for sale.'

"Is that your recollection of statements made at the meeting?

"A. Well, I don't know where I got that particular note, whether this came from some of the notes we had there or not. This was—these notes do refer to that same meeting.

"Q. Isn't that your recollection of what happened at the meeting? Wasn't that the purpose of this memorandum? [fol. 764] "A. Yes, sir.

"Q. And when it says 'they' there, that's talking about the representatives of the two towns?

"A. Representatives of the Chamber of Commerce I think actually, which contained people of both towns.

"Q. All right, sir.

. . . . . .

"Q. Do you recall that the 1958 territorial agreement between Powell Valley and Kentucky Utilities which we have mentioned before was cancelled effective January, 1963?

"A. Yes, sir.

"Q. And the possibility of terminating this agreement was discussed, was it not, at the April 12, 1962, meeting?

"A. Yes, sir.

"Q. And then shortly after the cancellation letter, did not the representatives of the towns seek another meeting between Powell Valley and TVA and the two towns, referring to 64 of your papers?

"A. Well, I'd answer that question that the Chamber of Commerce did request a meeting.

"Q. I show you letter of October 23, 1962, from Mr. William R. Stanifer to you. Do you recall receiving that letter asking for a meeting on November 13?

"A. Yes, sir."

[fol. 765] Mr. Rowntree: We shall not exhibit that.

* * * * * * * *

"Q. The meeting was not held on November 13, 1962, as requested, was it?

"A. No, sir, as I recall, it wasn't.

"Q. Did you go to Washington and talk to someone concerning this matter a short time after receiving that letter?

"A. Yes, sir, I did.

"Q. Who did you talk to?

"A. I talked to William Calloway and some other people in REA.

"Q. Mr. Calloway was a representative of REA?

"A. Yes, sir.

"Q. What was his position?

"A. He was an area director, I believe.

"Q. Covering this area?

"A. Northeast area.

"Q. Northeast area of the United States of——

"A. Of the United States.

"Q. Would he have anything to do with this area?

"A. I'm not sure how that's set up. He is the director of this area of REA.

"Q. This area falls in his territory?

"A. This falls in his territory."

[fol. 766] Mr. Rowntree: To line eight on page 41, at which time notes were presented of a meeting.

That would be Exhibit No. 61.

(Exhibit No. 61 was filed.)

Mr. Rowntree: We would like to read this, your Honor.

The Court: All right.

Mr. Rowntree: Exhibit No. 61, on November 6, 1962—I might say that these were notes provided by the witness, Mr. Miner, concerning this meeting.

"On November 6, 1962 a meeting was held in William H. Callaway's office in the Agriculture Building, Washington, D.C. The following people were present. William H. Callaway, director, Northeast Area, REA, Washington; Ray P. Stokley, same address; James W. Black, same address; Arnold Whiteaker, legal counsel, same address; Ralph B. Miner, manager, Powell Valley Electric Co-operative, Jonesville, Virginia.

"The purpose of this meeting was to discuss the possible acquisition of power facilities in Tazewell and New Tazewell, Tennessee. The people there have expressed an interest in lower cost power and have contacted the co-operative relative to providing this power. During the [fol. 767] course of subsequent discussion, it was decided the co-operative could not borrow the money from REA to acquire these facilities, however, it might be possible to finance all or part of it from General Funds. An alternate method was discussed, that of the co-operative operating and maintaining the system after the towns had purchased it from KU. Preferably, under this plan, the co-operative would retire the Revenue Bonds issued by the towns as they came due, spend whatever was necessary out of General Funds to modify or improve the system; and when the bonds were retired would own the system. (Should be careful not to let towns own it too long.)

"Most of the discussion centered around this method,

(bonds, etc.) and the following steps were outlined as a possibility for the two towns to consider:

"(1) Get authority to own and operate system.

"(2) Get authority from people to issue bonds.

"(3) Engineering firm to make engineering acquisition appraisal.—Rehabilitation and Integration.—New construction.

"(4) Arrange for power supply with TVA.

"(5) City work out acquisition details with KU.

[fol. 768] (6) City arrange with PVEC for operations and eventual acquisition. (Lease operate system—People would be customers not city.)

"(7) Obtain necessary state and local approvals (Virginia Corporation Commission) (Have co-operative attorney check with Virginia Association attorney) and Tennessee statewide attorney.

"(8) Get necessary approvals from TVA and REA.

"It was decided that the Board of the co-operative should indicate at their next meeting whether they want to help these people in their quest for low cost power and instruct the manager of their feelings—giving him and the attorney the necessary backing to do whatever they deemed wise and expedient to carry through on this.

"It was the opinion of the group that there would be nothing wrong with the manager showing an interest in the problems of these people and assuring them of the co-operative's interest in them.

"No agreement should be entered into with the towns until after acquisition by them of the facilities.

"If KU should lose in Middlesboro it might be wise for [fol. 769] the co-operative to approach KU relative to buying out their plant in the two towns—advising them the towns are planning to force them to sell anyway. It would probably save them a good deal of money.

"Revenue Bonds depend on the revenue from the electric system and do not jeopardize the towns anyway.

"Special considerations to consider were:

"(1) What happens to the few rural consumers served by KU and the county-wide movement."

Line 17 page 42.

"Q. Then, Mr. Miner, you recall that after you got back, a meeting was arranged for Powell Valley to meet with TVA on November 15, do you recall that?

"A. Yes, sir.

"Q. Do you recognize that as being notes of that meeting of November 15, with TVA?

"A. Yes, sir."

Mr. Rowntree: Mark this as Exhibit No. 62.

(Exhibit No. 62 was filed.)

Mr. Rowntree: I would like to read this, your Honor.

"On November 15, 1962, at 10:30 a.m., a meeting was held between representatives of TVA and Powell Valley Electric Co-operative in C. Wilson House's Office in Knoxville relative to Tazewell and New Tazewell, Tennessee, requesting service from some distributor of TVA power. The follow-
[fol. 770] ing people were present: C. Wilson House, manager, Eastern District Division of Power, TVA; Graham Wells, Chief Distributor Marketing Branch, TVA; C. A. Reidinger, attorney, TVA; Ralph B. Miner, manager, PVEC and Clyde Y. Cridlin, attorney, PVEC.

"The purpose of this meeting was to determine what course the people of the above towns should follow in procuring lower rates on the power consumed, and also to determine what course the co-operative should follow in helping them. The following methods were discussed, and it was decided by this group that the board of the co-operative should decide which of the two plans they would follow so that when we meet with representatives of the towns we can tell them exactly which way we think they should go:

Plan #1—(1) PVEC make sure of a power supply in the event KU cancelled Tri Party Agreement.

"(2) Offer to buy out KU.

"(3) Under this plan we would need to be willing to approach KU with the idea that if they did not sell we would get this load some other way, probably by duplicating their system.

"Plan #2 would be to advise the towns to approach KU relative to buying out their system after having

[fol. 771] first had an engineering firm appraise the property and having first had an engineering firm appraise the property and having checked the appraisal with TVA and PVEC.

"(2) Float Revenue Bonds in sufficient amount to buy our system.

"(2A) PVEC would lease operate the system.

"(3) PVEC would make necessary replacements and improvements and retire bonds. Also might buy a major part of the bonds initially.

"As an added means of putting pressure on the KU Company, the co-operative should contact the Utilities Commission in Nashville and ask for a hearing on the allocation of any territory to KU in this area.

"We then should make a trip to the Commission and tell them we think KU should be ordered out of the towns for these reasons:

"(1) KU rates are much higher.

"(2) The people want our power 95% or more.

"If they refuse to deny KU permission to serve this area tell them they should then order KU to lower their rates to the level of the co-operative.

"The two towns should adopt a resolution as follows:

They want cheaper power——"

[fol. 722] This is a meeting between the co-operative and the TVA. The town is not present.

The Court: I did not think these recommendations were from the KU Company.

Mr. Rowntree: Just pointing out the towns were not present.

"The two towns should adopt a resolution as follows:

They want cheaper power—The co-operative has this cheaper power—They demand that the co-operative serve them either by buying out KU or duplicating their system. (This would be part of Plan #1.)

(The reading of the deposition was continued.)

"Q. Now the towns of Tazewell and New Tazewell did not have representatives at this meeting, did they?

"A. No, sir.

"Q. And what is the purpose of that meeting as expressed in that memorandum?

"A. To try to determine what course the people of these towns should follow, or in what way we could help them in securing lower cost power.

"Q. In that memorandum, it does set forth two plans does it not, that were discussed at this meeting?

"A. Yes, sir.

"Q. And did you not express concern that Kentucky Utilities might pull out under the tri-party agreement and [fol. 773] did you not ask TVA for a commitment of TVA power supply in that eventuality?

"A. Well, I asked TVA sometime or other for a firm commitment for power in this situation. Whether or not we discussed this—well, that's what it says, in the event KU cancels tri-party agreement, in the notes.

"Q. And under that first plan that you were discussing there, that contemplated the operation, acquisition of the system by Powell Valley, is that not true?

"A. Yes, sir.

"Q. And is it not true that the idea was expressed in that meeting that Powell Valley would approach Kentucky Utilities to buy the Kentucky Utilities system in the area with the threat that a duplicate system would be constructed if they did not sell?

"A. Yes, sir, apparently that was one of the things that was considered.

"Q. And was that not this sort of plan or procedure rejected by REA preceding the meeting that you had had in Washington a few days before?

"A. Well, I don't think this approach was discussed with REA at all.

"Q. But the REA had certainly turned down any idea that a duplicate system would be constructed, had they not?

"A. Well, REA had made it clear that no loan funds (fol. 774) would be made available for anything in this area."

The Court: When you reach a stopping place, let me know.
Mr. Rowntree: We can do it right now.
The Court: Adjourn court until 1:20, please.

(At 12:00 noon, court adjourned until 1:20 p.m.)

[fol. 775] Afternoon Session

(At 1:30 p.m., court reconvened pursuant to the noon recess, when the following proceedings were had.)

The Court: Gentlemen, you may proceed.
Mr. Rowntree: We are reading the deposition of Mr. Miner, page 44, line 19.

(The reading of the deposition of Mr. Ralph B. Minner was continued by Mr. Rowntree and Mr. Welch.)

"Q. Well, it's true that Powell Valley would need loan funds if they buy tge Kentucky Utilities system there in the area, wouldn't it?
"A. They would need loan funds, not necessarily REA loan funds.
"Q. Well, the REA would have to approve any such acquisition, would it not?
"A. Well, you're getting into a legal field there; as far as I know, they wouldn't."

Mr. Rowntree: Here we make reference to Exhibit No. 59, the trust indenture, and we would like to read certain extracts from that.
The Court: Exhibit No. 59?
Mr. Rowntree: Yes, sir. The trust indenture under the REA loan. I would like to read paragraph V on page 4 of [fol. 776] that instrument, concerning the property over which the lien applies. It lists specific property, and the paragraph V reads:

[fol. 777] "Also, all right, title, and interest of the Corporation in and to all other property, real or personal, tangible or intangible, of every kind, nature, and description, and wheresoever situated, now owned or hereafter acquired or held by the Corporation it being the intention hereof that all such property acquired or held by the Corporation after the date hereof, shall be as fully embraced within and subjected to the lien

hereof as if the same were now owned by the Corporation and were specifically described herein, to the extent only, however, that the subjection of such property to the lien hereof shall not be contrary to law;"

The Court: Mr. Rowntree, that apparently covers all acquired property, what relevancy does it have to the issues in this case?

Mr. Rowntree: I think our brief briefly mentioned the applicability of this section in the event that the municipal facilities—so-called municipal facilities were considered to be acquired by Powell Valley.

The Court: They would come under the mortgage.

Mr. Rowntree: That's right; yes, sir. We don't think that was contemplated by any resolution passed by the municipalities.

The Court: And you claim the mayors, if they [fol. 778] permitted those things to go in the mortgage, are acting beyond their power.

Mr. Rowntree: Delegated powers; yes, sir.

We would like to read Section 10 of Article II on page 7 of this instrument, Exhibit No. 59:

"The Corporation"—meaning Powell Valley—"will not, without the approval in writing of the holder or holders of not less than a majority in principal amount of the notes at the time outstanding: (a) construct, make, lease, purchase, or otherwise acquire any extensions or additions to its system, or enter into any contract therefor, except such extensions or additions as may be financed with loans evidenced by additional notes; (b) construct any consumer services at its expense in excess of one pole and one span of wire in addition to a service drop not more than one hundred fifty (150) feet in length; (c) enter into any contract or contracts for the operation or maintenance of all or any part of its property, for the purchase of electric energy or for the use by others of any of its property; (d) incur any expenses for legal, engineering, supervisory, accounting, or other similar services, except such reasonable expenses as are incurred in the routine course of business; or (e) deposit any of its funds, [fol. 779] regardless of the source thereof, in any bank

or other depository which is not a member of the Federal Deposit Insurance Corporation, or the successor thereof, or of a Federal Reserve Bank.''

Going to line 16, page 45.

(The reading of the deposition was continued)

"Q. Now at this November 15, meeting between Powell Valley and TVA under your second plan there, did that contemplate acquisition of the system by the towns?

"A. Yes.

"Q. And did you discuss what steps the towns should take in connection with that second plan?

"A. Yes, we did.

"Q. And did it include making—having an appraisal made of the properties of KU in the area?

"A. Yes, sir, that was one of the first things apparently.

"Q. Did it include the issuance of bonds by the towns to acquire the system?

"A. Well, this was one of the things that could be done.

"Q. And was it discussed that Powell Valley Electric would take over the system by lease and operate it?

"A. Yes, sir.

"Q. And the third phase of that second plan that [fol. 780] was discussed was that Powell Valley would make necessary replacements and improvements and retire the bonds, also might buy a major part of the bonds initially, is that correct?

"A. That was discussed, yes, sir.

"Q. And was it contemplated that Powell Valley and others would go to the Tennessee Public Service Commission concerning this matter?

"A. This was discussed.

"Q. And was it discussed that the Commission would be told that ninety-five per cent or more of the people of the towns wanted Powell Valley power?

"A. This ninety-five per cent figure, I think, came from the representatives of the Chamber of Commerce or somebody that had met with us at one time or another.

"Q. Do you know where that figure came from or who reached such a figure as that?

"A. No, sir, I don't.

"Q. You don't know how such a figure was arrived at, the ninety-five per cent?

"A. No.

"Q. Then the last paragraph of 68, this occurs:

> "'The two towns should adopt a resolution as follows: They want cheaper power—The Cooperative has this cheaper power—They demand that the Co-[fol. 781] operative serve them either by buying out KU or duplicating their system.'

Was that discussed at this meeting?

"A. Well, that goes back to plan one, I think.

"Q. Yes, sir, it does say after this '(This would be a part of Plan #1).'

Was that discussed?

"A. Apparently it was.

"Q. And I notice that there's no reference to referendum or determining the will of the people in there. Was that not an important consideration as far as TVA and Powell Valley were concerned?

"A. Well, of course it is, but we felt that we had a—had had contacts from people who should be in a position to know what the will of the people was in this situation from time to time. I think possibly that's where this ninety-five per cent figure came from was from somebody who had talked to us at one time or another.

"Q. Of course up to this time, you had been talking to members of the Chamber of Commerce, had you not? Had any official action been taken by the town, governing bodies, at this point?

"A. None that I know of.

"Q. Now this Exhibit 62, notes on meeting of November 15 in the paragraph after the list of those present [fol. 782] states that:

> 'It was decided by this group that the board of the Cooperative should decide which of the two plans they would follow so that when we meet with representatives of the Towns we can tell them exactly which way we think they should go.'

"Did the Board of the Cooperative consider this question after that meeting of November 15?

"A. Yes, sir, they did.

"Q. Was there any official action taken by the boards?

"A. I think they made recommendations.

"Q. Do you have any minutes on that?

"A. I'm sure that we do.

"Q. Could we look at them?"

On line 7, page 49.

"(The Minutes were obtained.)

. . . . . .

"Counsel has provided minutes of meeting, Board of Directors of Powell Valley Electric Cooperative for the month of November, 1962, held November 16, 1962, paragraph 7, quoting:

> " 'The manager then reported on meetings with REA officials in Washington in regard to the request by Tazewell and New Tazewell, Tennessee, that we help them [fol. 783] secure low-cost power. Manager Miner and Attorney Cridlin also reported on a meeting held with TVA in regard to the same request. This was fully discussed, and the Board of Directors indicated they were sympathetic with the cause of the people in this area and felt we should provide any help we could in the way of advice and arranging the necessary meetings.'

"Q. Do you recall, Mr. Miner, that a meeting was held between Powell Valley and TVA and representatives of the towns on November 27, 1962, referring to 93?

"A. Yes, sir.

"Q. I show you notes of such a meeting. Do you recognize those as being your notes with respect to what happened at that meeting?

"A. Yes, sir."

Mr. Rowntree: We introduce this as Exhibit No. 63.

(Exhibit No. 63 was filed.)

Mr. Rowntree: We would like to read this, your Honor.
The Court: Exhibit 63?
Mr. Rowntree: Yes.

"Q. I notice that that date written out there was 1963, but you think this was a mistake?

"A. This was an error; it should have been '62."

[fol. 784] Mr. Rowntree: Now reading Exhibit 63:

"On Tuesday, November 27, 1962, a meeting was held in C. Wilson House's office in Knoxville, Tennessee, to discuss Tazewell and New Tazewell, Tennessee's request for help in securing low cost power. The following people were present:

"William R. Stanifer, attorney; Joe F. Essary, Mayor of Tazewell; Bill DeBusk, Mayor of New Tazewell; Paris Coffey, representative of Chamber of Commerce; Dr. William Smith, representative of Chamber of Commerce; Edgar H. Drum, law division, TVA; Ralph B. Miner, manager, PVEC; Clyde Y. Cridlin, attorney PVEC; C. Wilson House, district manager, TVA, and Paul S. Button, director of Power Market, TVA.

"There was a full discussion of what the people in the two towns desire and they let it be known that their purpose for having this meeting was to get advice as to the best means to secure this low cost power.

"It was decided that the first step should be for the governing bodies of the two towns to adopt a resolution as follows:

"(a) That the chief aim is to secure low cost power regardless of who the supplier might be.

"(b) That they are determined to go all the [fol. 785] way in securing low cost power.

"(c) That they will procure a competent engineering firm who will make an appraisal of the existing facilities of the two towns along with the short extensions outside the corporate limits and also including the facilities along 25E as far north as the Powell River Bridge. (Said facilities are now the property of Kentucky Utilities Company.)

"The next step would be to approach Kentucky Utilities Company and ask their representatives if they would be willing to sell these facilities. If they are willing, ask them to make a price. If they are unwilling, inform them that the two towns intend to have low cost power if it means duplicating the system then this will be done. An offer would be made at this time based on the engineering appraisal as mentioned in the resolution.

"Means of financing this venture were discussed and the consensus of opinion was that it would need to be financed with revenue bonds. These bonds do not obligate the towns in any way, but would be retired from the revenues of the electric system. Representatives of the co-operative informed people at this meeting they would be willing to operate this system, make [fol. 786] necessary replacements and improvements out of their general funds and retire the revenue bonds as they came due.

"One further question that was brought up was: That if the people of Tazewell and New Tazewell approach the Public Utilities Commission and ask them to require the Kentucky Utilities Company to either lower its rates to the level of the rates charged by the co-operative, or if they are unwilling to do this, require the Kentucky Utilities Company to sell their facilities, then if they do not get action and they adopt a resolution demanding that the Powell Valley Electric Co-operative duplicate their (KU) system, what position would the co-operative take?

"This question has since been asked of REA officials in Washington and they advise they will let us know what their thinking is in this regard.

"The engineering firm has also been contracted relative to a meeting with officials of the two towns. A meeting date is tentatively set for Tuesday, December 18.

[fol. 787] "By Mr. Rowntree:

"Q. Did you express at this meeting the concept that Powell Valley Board decided that it would be better for the towns to take over the system, or do you recall, rather than having Powell Valley take over?"

. . . . . .

"A. Well, I don't recall, and I don't see it in the notes here. I did say in this paragraph at the top of the second page that we informed them we would be willing to operate this system.

"Q. Yes. And apparently you did discuss, did you not, the general form of a resolution to be passed by the two towns?

"A. Yes, sir, this was discussed.

"Q. And included in that would be an appraisal by a competent engineer of the KU property, is that right?

"A. Yes, sir.

"Q. And it was again expressed here that KU would be approached about selling their facilities and if they were unwilling, KU would be informed that the two towns intended to have low-cost power if it meant duplicating the system. Was that idea expressed?

"A. Yes, sir.

"Q. Now on the second page there, that second full paragraph, it was—the question was raised as to, if Ken-[fol. 788] tucky Utilities was not required to lower its rates by the Tennessee Public Utilities Commission, and if Powell Valley was asked by a resolution of the towns to duplicate the KU system in the towns, what position would the cooperative take? Was that question raised at the meeting?

"A. It apparently was.

"Q. Now the next paragraph after that is this, quote:

> 'This question has since been asked of REA Officials in Washington and they advise they will let us know what their thinking is in this regard.'

"Whatever became of that now? Have you received any communication or any——

"A. I don't think so.

"Q. Then do you recall that a meeting was discussed for December 18th with the appraiser that was selected, Mr. Cottrell?

"A. He had a tentative date set for Tuesday, December 18th, here, looks like.

"Q. Refer to 94. Now do you recall that you attended that meeting?

"A. Yes, sir.

"Q. Is this paper I hand you your notes concerning that meeting?

"A. Yes, sir."

[fol. 789] Mr. Rowntree: I'd like to file that as Exhibit No. 64.

(Exhibit No. 64 was marked for identification and filed.)

The Court: Notice of what date?

Mr. Rowntree: This is a meeting of the towns.

The Court: What date?

Mr. Rowntree: December 18, 1962.

The Court: All right.

Mr. Rowntree: I believe I would like to read parts of this one, Your Honor.

"On Tuesday, December 18, 1962, at 1:00 P.M., a meeting was held in the Court House in Tazewell, Tennessee. The following people were present:

"Ralph B. Miner—Manager, PVEC
"Earl Sandefur—Superintendent, PVEC
"R. H. Cottrell, Jr.—Engineer, Nashville
"J. B. Debusk—Mayor, New Tazewell
"J. F. Essary—Mayor, Old Tazewell
"E. J. Hardin, III—Future Mayor, Old Tazewell
"Dr. Wm. Smith—Member Chamber of Commerce, Claiborne County

"The purpose of this meeting was for representatives of [fol. 790] the two towns to discuss with Mr. Cottrell an engineering appraisal of the facilities now owned by KU in the Tazewell and New Tazewell area including all rural distribution lines south of Powell River.

"Mr. Cottrell gave the said representatives a brief idea of what this appraisal would be comprised of:"

There are other statements in there, but we won't read them.

"By Mr. Rowntree:

"Q. And there you meet with Mr. Sandefur, the superintendent of Powell Valley in Tazewell and New Tazewell and with Mr. Cottrell and with representatives of the two towns including the two mayors, is that correct?

"A. Looks like I had two mayors and a future mayor.

"Q. Yes, sir, and that was Mr. Ed Hardin?

"A. Right.

"Q. Do you recall that the towns, in addition to discussing the appraisal also raised questions with respect to cooperative services including whether or not an amortization charge would be charged by Powell Valley if Powell Valley power was supplied to the towns?

"A. There were questions asked about the amortization charge.

[fol. 791] "Q. Well, referring to page 2 there at the top of the page, is that the answer that you gave?

"A. That's right.

"Q. Quoting: 'In regard to the Amortization Charge, they were told that this charge would be eliminated as soon as it could be determined that it would not jeopardize the financial condition of the Cooperative.'

"A. That's correct.

"Q. At that time Powell Valley has no office in Tazewell or New Tazewell, did they, billing office?

"A. No office that could be used for the payment of bills and so forth.

"Q. Do they have any such office today?

"A. No, sir.

"Q. Do you recall that you met with the city council from time to time after that, city councils of Tazewell and New Tazewell?

"A. I recall, I believe, that I attended two meetings. I'm not sure that they were—whether they were joint meetings or just what type of group made it up.

"Q. Do you recall attending a meeting on the night of May 13, 1963, of the councils of the two towns?

"A. Is it all right if I refer to these notes?

"Q. Yes, sir, go right ahead. And I believe at that meeting, Mr. Bowers, Attorney from the Tennessee Munici- [fol. 792] pal League, was present. Do you recall that?

"A. No, sir, I didn't attend the meeting that Mr. Bowers was present in as far as I know. What was that date again?

"Q. May 13, 1963. I think that was a special called meeting.

"A. I attended a meeting that had this Dr. Puett."

Mr. Rowntree: Skip to the top of page 56.

"Q. You don't know whether this was the meeting of May 14, 1963, or the meeting of May 13, 1963?

"A. I don't have any date. I have in my notes that I attended a meeting in which Dr. Puett from the University of Tennessee was present and he was representing an organization known as the municipal technical advisory service."

"Q. Is that the meeting where the possibility of issuing bonds by the municipalities was discussed by Dr. Puett?

"A. They discussed various different things, bonds and different methods that this thing could be done. As I understood it, he was there in an advisory capacity.

"Q. And do you recall that shortly after that meeting, the councils cancelled the previous call for a referendum on this question?

"A. I read that in the paper, I believe.

* * * * * * *

[fol. 793] "Q. A short time after the meeting that you attended?

"A. Shortly after this meeting, yes, sir.

"Q. Do you recall attending a meeting on February 18, 1963, a special meeting at night?

"A. Well, I have here that I attended a meeting on February the 11th, 1963.

"Q. You have no notes on a meeting of February the 18th?

"A. No, sir, I don't have.

"Q. Did you make any statements at that meeting of

February the 11th, and if so, generally what was stated, if you can recall?

"A. Well, I'll refer to these notes.

"Q. All right, sir.

"A. I made statements as follows:

"'1. That we had had numerous requests from people in the area to help them obtain TVA power, even to the point of people threatening to sue the cooperative;

'2. That we were willing to help as much as we could, but that they (the towns) would have to take the initiative in any action;

'3. That our cooperative was doing fairly well financially and could continue to do so without the towns;

'4. That we would advise, but do not want to [fol. 794] push them into anything—if they were satisfied as things were, then so were we.'

"Q. Then your recollection is that that was February 11, 1963?

"A. I have that date in these notes. I'm not sure where I got it, but it is the date I have.

"Q. Did you attend any council meetings after that meeting, and besides this meeting with Dr. Puett?

"A. No, sir, to my recollection, those two are the only meetings that I have attended."

. . . . . .

"Q. Now do you recall, Mr. Miner, attending a meeting February 12, 1963, between the Powell Valley and representatives of Tennessee Rural Electric Cooperative Association in Nashville?

"A. Yes, sir.

"Q. Are these the notes of that meeting that you prepared?

"A. Yes, sir."

Mr. Rowntree: File those as Exhibit 65.

(Exhibit No. 65 was marked for identification and filed.)

Mr. Pedersen: What is the date of that meeting?

Mr. Rowntree: This is February 12, 1963.

[fol. 795] Quoting:

"On February 12, 1963, a meeting was held in the Tennessee Rural Electric Cooperative Association Building in Nashville, Tennessee. The following people were present.

"J. C. Hundley—Executive Manager TRECA
"Alfred MacFarland—Attorney, TRECA
"Ralph B. Miner—Manager, PVEC
"Clyde Y. Cridlin—Attorney, PVEC

"One purpose of this meeting was to discuss with the T. R. E. C. A. people the developments in the Tazewell-New Tazewell Area in regard to their seeking lower power rates than are now available from K. U. Company.

"They were presented copies of all the notes that had been taken at meetings between representatives of PVEC and REA, PVEC and TVA, PVEC, TVA and City Officials of both Tazwell and New Tazewell and finally between PVEC, City Officials and Cottrell & House, Engineers.

"The TRECA Attorney concurred in everything that had been done and stated that we probably were doing everything we could until the Towns moved further. He did recommend, however, that the Towns appeal to the Public Service Commission for K. U. Company to be [fol. 796] required to 'show cause' that their bills are nearly double that available from other sources in the area.

"Another point discussed with no opinion voiced was whether the two towns would be bound by a Franchise signed by the County before the Towns were incorporated, authorizing K. U. to serve the area.

"The Manager and Attorney of TRECA made themselves available to PVEC or Representatives of the Towns for any service they might be able to perform and made it very clear they would like to see PVEC serve the Towns.

"The Attorney thought it would be a good idea for PVEC to buy a large part of the Bonds when and if they are issued, if not all of them."

"By Mr. Rowntree:

"Q. Mr. Miner, is it possible that this council meeting that you recollected going to on February 11th, could have been on February 18th?

"A. Yes, sir, it is possible.

"Q. And therefore this meeting with Tennessee Rural Electric Cooperative Association noted in Exhibit 11 could have been prior to that council meeting?

"A. Could have been prior to that council meeting.

"Q. Who called this meeting? How did it come about? [fol. 797] "A. This meeting came about through my inquiring of Jake Hundley about the tax-exempt status from sales tax of a cooperative in Tennessee by telephone.

"Q. Did you——

"A. As I recall it.

"Q. Did you get advice that the cooperative was exempt?

"A. Yes, sir, Jake agreed to go by the place down there and talk to the people for us, I think.

"Q. Was this a sales tax question?

"A. Yes, sir, on items that the cooperative buys.

"Q. And you did obtain your exemption?

"A. Yes, sir.

"Q. And was the Tazewell-New Tazewell matter discussed at that meeting?

"A. Yes, it was.

"Q. Do you recall that at this council meeting of February 18, 1963, that the councils decided to go to the Tennessee Public Service Commission about a reduction in the Kentucky Utilities rate?

"A. I recall that being discussed.

"Q. Were you present when the—in a later council meeting when the answer of the Tennessee Public Service Commission was received and discussed by the council?

"A. I don't believe so.

[fol. 798] "Q. Do you know what action the Commission took for that resolution of the two towns?

"A. No, sir, I can't say that I do."

Mr. Rowntree: To line 14 on page 62.

"Q. Do you recall that in June, 1963, the matter was discussed between you and TVA as to a commitment by TVA of TVA power for Tazewell and New Tazewell?

"A. Well, of course I recall that being discussed.

"Q. Referring to Mr. House's Exhibit No. 23, the communication between Mr. House and Mr. Button, the last paragraph concerning a letter from you requesting that TVA write the cooperative a letter regarding power supply, Mr. House states that—states to Mr. Button:

> 'You will recall we agreed to sending such a letter in our meeting with Messrs. Miner and Cridlin in my office on June 14, 1963.'

"Does that ring a bell with you about such a meeting?

"A. Yes, sir.

"Q. Was it agreed at that meeting on June 14, 1963, that TVA would send a letter committing TVA to supply power to Tazewell and New Tazewell?

"A. I'm sure TVA agreed at that meeting that they could supply the power, whatever our needs would be in this area.

[fol. 799] "Q. Now also in connection with Mr. House's Exhibit 23, do you recall receiving the letter of August 14 to you from Mr. Hardin, that's August 14, 1963?

"A. Yes, sir.

"Q. And do you recall sending the letter of August 26, 1963, to Mr. House, also contained in that exhibit?

"A. Yes, sir.

"Q. Now who prepared this communication here from you to Mr. House?

"A. I did.

"Q. Do you know who prepared this communication from Mr. Hardin to you?

"A. Well, I'm not sure that I do.

"Q. Now do you recall that another meeting with TVA was scheduled after this exchange of letters?

"A. I recall that there were other meetings. But that's a long time ago.

"Q. Do you recall receiving the letter of August 30, 1963, from Mr. House to you scheduling a meeting with Mr. Ardery and yourself for September 5, 1963?

"A. Yes, sir.

"Q. Then do you recall that another series of letters were exchanged concerning the commitment for power after that meeting of September 5?

"A. Yes, sir.

[fol. 800] "Q. Referring to Mr. House's Exhibit 26 and 27, and here's Exhibit 27, do you recall those papers being exchanged?

"A. Yes, sir.

"Q. Now why was there a second go-round on this exchange of commitment papers, do you recall?

"A. Yes, sir.

"Q. What was it?

"A. The first letter to me was from Mayor Hardin and just included the town of Tazewell, as I recall it.

"Q. And the second one included both towns?

"A. And the second one was from both mayors and included both towns.

"Q. Was it contemplated that a joint system be created or was this discussed?

"A. Well, it was discussed, I think, from time to time."

Mr. Rowntree: There's a question missing there. I asked if it was ever established as a joint system, I believe.

"A. Well, I don't know that it has yet.

"Q. Well, really there's been no practical step yet taken by the towns to actually establish a municipal system, has there, Mr. Miner? They haven't even resolved the question of whether it will be a joint system.

[fol. 801] "A. Well, they agreed to do this thing together as a joint venture when they wrote this letter. I remember that being discussed, and as far as their legal side of the picture, I wouldn't know about that.

[fol. 802] "Q. It was not so much the legal proposition as the practical proposition, isn't it, Mr. Miner? Can you call this a Tazewell system, or can you call it a New Tazewell system, or what would you call it?

"A. Well, in our relationship with them, we call them the Tazewell-New Tazewell Power Board.

"Q. In other words, you are contemplating a joint system?

"A. That's what we——

"Q. In other words——

"A. We would much rather see it that way, because it

would be a lot more trouble to deal with two people, two systems than it would with one.

"Q. That would be preferable from your standpoint?

"A. Yes, sir.

"Q. But there's been no official action taken by the cities to establish such a system yet?

"A. Well, I can't tell you of any action they have taken; I don't know.

"Q. You know of no such action?

"A. I know of no such action."

Mr. Rowntree: To line 17, page 67.

"Q. Do you recall when the taking of KU customers started in Tazewell and New Tazewell? About October 30th of '63, is that your best recollection?

[fol. 803] "A. Well, that's—I'd say that's when the people began to disconnect from KU's lines and go over on the city system.

"Q. The customers didn't do that themselves though, did they?

• • • • • • •

"Q. Well, did the customers make this change in service themselves?

"A. Well, I understand in some cases that they actually took the KU meter off of their own home. I wasn't there.

"Q. That would be after the meter was disconnected or service to Powell lines was connected?

"A. I couldn't answer that. I don't know at what point in there this happened. This is hearsay.

"Q. Have you heard that customers went out and disconnected KU service and took the KU meter out before somebody came around to put in the Powell Valley power supply?

"A. No. Now wait a minute. Just a minute. The Powell Valley power supply, that's the towns' power supply we're talking about here.

"Q. Where did the power come from?

"A. Well, that's almost impossible to answer, because KU and TVA are tied together all up and down the country.

[fol. 804] "Q. Are you saying this was KU power that was being put in in place of KU power?

"A. No, you asked where it came from; I can't answer that question, because I don't know.

"Q. Well, was it Powell Valley power at sometime before it got into the house?

"A. Yes, sir, it passed over Powell Valley lines.

"Q. Did Powell Valley enter into a contract with the cities concerning the furnishing of this power?

"A. Well, we wrote them a letter which we agreed to furnish the power, and I'd say the agreement was a verbal agreement with the people.

"Q. This letter you referred to which we have already looked at just a while ago in Mr. House's Exhibit 26 or 27, is that correct?

"A. Yes, sir.

"Mr. Pederson: What are you asking about 27?

"Mr. Rowntree: That letter that he referred to.

"The Witness: Yes, sir that's the letter.

"By Mr. Rowntree:

"Q. That is the letter of September 24, 1963, from you to Mr. Hardin and to Mr. DeBusk?

"A. Yes, sir.

"Q. Now you say there was a verbal agreement [fol. 805] besides what was contained in that letter?

"A. Yes, sir, I think it would be a verbal agreement.

"Q. And when was that verbal agreement made?

"A. I don't believe I could tell you.

"Q. Did it consist of just one conversation or conversations over a period of time?

"A. I'd say it consisted of conversations over a period of time.

"Q. And that relates back to these various meetings we are talking about, and things that were said in those meetings, is that right?

"A. Yes, sir.

"Q. So all of those were incorporated in the understanding of the parties at the time that this power started to be supplied by Powell Valley to the two towns?

"A. Yes, sir.

"Q. Did you have anything to do with the negotiation of a contract between Irby Construction Company and the towns, one or two contracts?

"A. Well, in what respect?

"Q. Did you bring the parties together or assist in any way in negotiating that contract or those contracts?

"A. Well, I contacted this contractor for the town.

[fol. 806] "Q. And this contractor was presently, at that time, working for Powell Valley on certain projects?

"A. Yes, he was, the company was.

"Q. Did you also assist or help in negotiation of procuring engineering services for the two towns with Mr. Cottrell?

"A. Yes, sir, I set up the original meeting. I contacted Mr. Cottrell back in '62, I guess, originally, and he met with these people

"Q. That was concerning an appraisal?

"A. That was concerning an appraisal, and he later stopped by and talked to them from time to time as I understand it. I don't have any documented thing on that, but he did stop from time to time and talk to them, I think.

"Q. Well, did Powell Valley coordinate with Irby Construction Company in turning on Powell Valley power in to the customers of the towns?

"A. Yes, sir.

"Q. What was your recollection as to how long Irby Construction Company worked there for the two towns?

"A. I really don't know how long he worked.

"Q. Would you say it was a week or ten days or what?

"A. Somewhere in that neighborhood, I'd say.

"Q. Now did Powell Valley do anything about [fol. 807] supplying transformers or poles, lines or meters, with respect to this municipal power system?

"A. Well, we sold Irby some materials, as far as transformers and things of that nature are concerned. The meters we own now.

"Q. What about transformers?

"A. The transformers were sold to Irby.

"Q. By Powell Valley?

"A. By Powell Valley.

"Q. And Irby installed the transformers on this municipal system?

"A. Yes, sir.

"Q. And the cost of the transformer would be included in Irby's bill to the cities then, I suppose?

"A. Yes, sir.

"Q. And you billed Irby for the transformers?

"A. Yes, sir.

"Q. Was the same true with respect to poles?

"A. Yes, sir.

"Q. And lines?

"A. Any material he got from us was true.

"Q. But the meters that were installed were Powell meters and still are?

"A. They are Powell Valley meters.

"Q. Now what—when and where was the rate to be [fol. 808] charged negotiated? Was that part of this conversation over a period of time about which the rate was arrived at?

"A. I would say yes to that question.

"Q. There was no specific conversation where the rate was finally set forth on a piece of paper or anything of that nature?

"A. Well, there must have been a final summary of the thing, but I would say that this was arrived at on different conversations.

"Q. Now was the rate the same as on this Exhibit No. 4, card for the residential rate?

"A. The rate per kilowatt hour is the same.

"Q. Now that is what the customer of the town paid for the electricity supplied through this municipal system?"

* * * * * * *

"Q. Was this rate on Exhibit 4, was that paid by the customer of the town for this power?

"A. This is paid by the ultimate consumer.

"Q. Now what did the Powell Valley charge the town for the power?

"A. Well, that's quite an accounting process. We are charging them our wholesale rate plus one mill per kilowatt hour for the transmitting of the energy over our

lines. I believe this is correct. This is pretty detailed [fol. 809] stuff.

"Q. Now I believe Powell Valley handled the billing and collection of the money for the towns, is that true?

"A. Yes, sir.

"Q. And the customers, were they customers of Powell Valley? I mean the ultimate consumer?

"A. No, sir, they are set up as customers of the Tazewell-New Tazewell Power Board here in our records.

"Q. Well, were they members of the co-operative?

"A. No, sir, they are not members of the co-operative. Some of them may be at other points, but not in connection with this.

"Q. Well, are the towns members of the co-operative?

"A. I believe they are.

"Q. Do you have a breakdown of your customers as to classification, who can be members?

"A. What's that question again?

"(The last question was read by the reporter.)

"A. I don't follow your reasoning on that question.

"Q. Well, generally a customer would be an owner of a residence who wants some service. What about a large factory now? Is there a classification that covers him for membership?

"A. He's an industrial customer.

[fol. 810] "Q. What are the requirements for an industrial customer to become a member that would differ from an individual house owner becoming a member?

"A. Well, his becoming a member would be the same as far as I know.

"Q. And those requirements are that the name is submitted to the Board or to a meeting of the membership on a regular annual meeting?

"A. That's correct.

"Q. And that he be approved and pay five dollars, is that correct?

"A. Well, this is a—as far as I know, this is it.

"Q. Well, when was—when were the two towns approved as members?

"A. I couldn't answer that. The way that I answered that, they were members. I think they have in the past put

some street lighting on and that they are set up in our membership files as members.

"Q. But there was no action to give them membership that you can recall after this letter of September 24th when you made your commitment for the power?

"A. No, sir, there was none that I know of.

"Q. Do you have a record of your membership?

"A. We have membership files, cards, set up on [fol. 811] each member.

"Q. Could we see the membership cards on Tazewell and New Tazewell?

(Discussion off the record.)

"The Witness: We are having trouble finding these things. Now these are accounts set up for street lighting purposes, and they are still looking for them. They must be in somename other than——.

"By Mr. Rowntree:

"Q. That's separate and apart from this municipal system?

"A. This has nothing to do with this municipal system.

"Mr. Cridlin: Had it under "City", no wonder we couldn't find it.

"Mr. Rowntree: This is a card showing City of Tazewell, membership date September 5, 1961, amount $5.00, address Tazewell, Tennessee."

Mr. Rowntree: We skip to line 6, page 77.

"Q. Isn't this municipal system just part of the Tazewell system, I mean part of the Powell Valley system?

"A. Well, I don't think it is.

"Q. Well, they are members, are they not?

"A. No, sir.

"Q. Did you have anything to do with negotiating [fol. 812] a loan by the Powell Valley Bank of Jonesville to the two towns?

"A. In what connection again?

"Q. Did you have anything to do with bringing the parties together or helping to negotiate?

"A. Yes, sir, I'd say that I did.

"Q. To what extent there?

"A. Well, they met here in the office, and—I mean they met here and talked with an attorney, I believe, and then went on to the bank. I didn't go to the bank with them."

Mr. Rowntree: Line 10 on page 78.

"Q. Now who has done the recent establishment of new services, power services in Tazewell and New Tazewell since Irby Construction Company left besides Kentucky Utilities?

"A. Which services?

"Q. How about March, 1964, four-pole extension near Baltrip and C. M. Johnson?

"A. Well, I would assume that since you have it on that list that KU didn't build that one.

"Q. That's correct.

"A. And other than than, I can't—I really can't answer that one. I don't know who it served.

[fol. 813] "Q. What about this April, 1964, a one-pole extension to serve Lawrence Muncey?

"A. I think that was built by Powell Valley; the name rings a bell.

"Q. Is it part of Powell Valley's system or part of the municipal system?

"A. Well if it's the one that I think it is, it's Powell Valley.

"Q. What about this April, 1964, a one-pole extension near Kenneth Western to provide temporary service for home being built by Mack Gray?

"A. I don't even know where that one is.

"Q. What about April 30, 1964, temporary service on existing pole for new home being built by Darrell Campbell?

"A. I don't think I know anything about that one."

* * * * * * *

"Q. May 7, 1964, thirteen-pole extension from near the homes of Glen and Tommy Lester through the Mark Lewis farm into New Tazewell to a point near the Howard Beeler home and the colored church?

"A. Did this tap serve Mark Lewis' son, Bill Lewis?

"Q. Will Lewis, yes.

"A. I think he is Mark Lewis' son. Powell Valley built that.

"Q. Is that part of the Powell Valley system or [fol. 814] the municipal system?

"A. That's part of the Powell Valley system.

"Q. May 8, 1964, temporary service on existing pole to provide temporary service for a house being constructed for resale by Fred Lifford, Earl Sanderfur and Bill Poore in the Coffey subdivision?

"A. That one is a part of the Tazewell system, I believe.

"Q. Who did the work on that?

"A. Well, I'm not sure who did it, but I'm sure that somebody from—some of Powell Valley personnel did it, under the direction of the people at Tazewell, the Mayor.

"Q. April 21, 1964 one pole extension and temporary service for new building being constructed near the Coffey Funeral Home?

"A. I don't know."

* * * * * * *

"Q. June 11, '64, two-pole extension to serve a house recently moved by Paul Crutchfield formerly occupied by Clarence Overton. Do you recall that?

"A. Well, I know there's one out in the west end of New Tazewell that was moved. Now whether this is the house or not, I don't know.

"Q. Did Powell Valley make a connection with that house after it was moved, the house that you recall?

[fol. 815] "A. The one I recall, it is being served by Powell Valley.

"Q. And that's part of Powell Valley's system?

"A. As far as I know, it is.

"Q. June 17, '64, an eight-pole extension along U. S. 25E in Tazewell located across the highway from KU Campany facilities to serve a new building being constructed by Mayor Ed Hardin, III, and a building on the Lon Francisco property being constructed by George Malone and Bill Harrell near the Claiborne County courthouse?

"A. Well, this was built by—let's go back to the original question, what are we asking?

"Q. Who did the work; whose facilities are these?
"A. These are the town of Tazewell.
"Q. This eight-pole extension?
"A. Yes.
"Q. All of these others, are they——
"A. No, just——
"Q. Just this one?
"A. We are just talking about the one to the Mayor's building down there.
"Q. So this is a part of the Tazewell system?
"A. Yes, it is.
"Q. Now who did the work on that?
"A. Powell Valley forces did the work.
[fol. 816] "Q. Have you billed the town for that?
"A. I don't know whether we have or not.
"Q. Did you use your own equipment and your own men, workmen, to do that work?
"A. Yes, sir.

• • • • • • •

"Q. July 13,"——

Mr. Rowntree: skip that one.

"Q. July 17, '64, a two-pole extension to provide temporary service for the new textile factory.
"A. Yes, that was a rather unusual one. I think that's built by a combination of Powell Valley and Claiborne County Telephone Company.
"Q. Is that part of the Powell Valley system, or the municipal system?
"A. Well, that must be partly Powell Valley and partly Claiborne Telephone, and I honestly don't know whose poles they are. It was just to put in temporary service for the factory, telephone and power.
"Q. Now I would like to see the rest of these REA —that is the papers that we were talking about relating to REA which would be 81, 106, and 123.
"Let me ask, Mr. Miner, what is the ultimate understanding between you and the towns as to these recent extensions that we have just been going over? Will that [fol. 817] become part of the municipal system ultimately, or is this to remain—those that are Powell Valley, are

they to remain Powell Valley facilities even after a municipal system is established?

"A. Well, I hope they remain Powell Valley.

"Q. Those that are Powell Valley, you hope will remain Powell Valley?

"A. Yes.

"Q. Well, has it been considered by the Board of Powell Valley or by yourself as manager that all facilities of Powell Valley other than transmission lines and substations, all service—including all service facilities that is, will become—will be acquired by the municipal system?

"A. Well, we have thought about—the people down there talked about this thing a little bit once.

"Q. On the other hand—well, has a decision been made concerning that?

"A. Well now, I don't think this has ever been mentioned in a board meeting, and I'm not sure that it's been considered too much anywhere.

"Q. Well, on the other hand then, is it the ultimate plan for Powell Valley to take over the municipal system after this case and after a municipal system had held to be established in this case?

[fol. 818] "A. Well, I'd like to see Powell Valley take it over, certainly.

"Q. It would add considerable business to Powell Valley certainly, would it not?

"A. Yes, sir.

"Q. And you have some customer contracts down there, or you would have good customer contracts down there after you took over such a system?

"A. Yes, sir, there's no question about that.

"Q. Now we'd like to file this letter of August 29, 1963, from Mr. Callaway of REA in Washington to you."

Mr. Rowntree: We offer that as Exhibit No. 66.

The Court: Received.

(Exhibit No. 66 was filed.)

Mr. Rowntree: We would like to read that one, your Honor. It is on the letterhead of the United States Department of Agriculture, Rural Electrification Administration, Washington, dated August 29, 1963, to Mr. Ralph

B. Miner, manager, Powell Valley Electric Co-operative, Jonesville.

"We have reviewed the information you have provided us concerning electric service in the towns of Tazewell and New Tazewell, Tennessee.

"It is understandable from our previous discussions that the people of these towns are dissatisfied [fol. 819] with the rates which Kentucky Utilities Company charges them for power and, as a result, the towns have been giving consideration to forming municipally owned systems with a view to obtaining power at TVA rates. We can also appreciate the fact that the representatives of the towns have contacted you to ascertain the extent to which your co-operative can participate in this effort to obtain TVA power. You are, of course, interested in keeping abreast of any developments concerning power supply not only in the towns but in the area around them because your co-operative serves in the rural area around the towns and the establishment of municipally owned or operated systems may affect your service area.

"The matter of the source of power for the inhabitants of the towns is purely a local question. You are correct in believing that you must keep informed about the plans of the towns in the interest of protecting your own business in the area. There would appear to be no grounds for REA objecting to your supplying information to the towns or rendering such other assistance as is within your corporate powers provided that the initiative for changing the source of power supply in the towns continues to come from them. As previously discussed, the co-operative should certainly not engage in promoting a change of [fol. 820] power supplier in the towns.

"REA loan funds as you know are not available to finance construction of any facilities to implement a plan for substituting another power supplier for that presently serving the towns. Also it is our understanding that the use of general funds is not being contemplated for this purpose. In this connection, you may wish to review REA Bulletin 1-7 which sets forth guidelines for the use and investment of your co-operative's general funds.

"We hope that this letter will be helpful to you and your board of directors in future consideration of this matter.

Please do not hesitate to communicate with us if we can be of any further assistance."

Signed, WILLIAM H. CALLAWAY.

[fol. 821] "By Mr. Rowntree:

"Q. Have you received any other communication from REA besides that letter approving activities of Powell Valley in connection with this Tazewell-New Tazewell power situation?

"A. I don't believe so."

Mr. Rowntree: Drop to line 13, page 85.

"Q. Now in this memorandum that you prepared for Mr. Steele, that concerns, does it not, a meeting held by the Board of Powell Valley with representatives of REA?

"A. Well, it is concerning a board—a meeting of the Board of Powell Valley at which these fellows were present. I think this was—just happened to be, they were here.

"Q. And are you explaining to Mr. Steele, who was your Board Chairman, the remarks made by these REA men at that meeting, is that right?

"A. That's correct.

Mr. Rowntree: We will just read in the third paragraph of that memo, quote:

'He stated—'

"By Mr. Rowntree:

"Q. Does that refer to Mr. Peters of REA?

"A. Let me look at it. Yes.

"Q. 'He stated during the Board meeting that no loan funds could be made available for the acquisition [fol. 822] of these facilities. However, he made it clear that REA would not stand in the way of Powell Valley Electric in acquiring the properties. He also said we should help these people in any way we could without initiating any action ourselves.'

"Do you recall the date of this meeting?

"A. No, sir, I don't.

"Q. So it is the ultimate purpose of Powell Valley to

acquire the power facilities of the towns in Tazewell and New Tazewell, is that right?

"A. Well, I'd say as manager of Powell Valley, I'd certainly like to see them own it some day.

"Q. And you have been active with respect to this project for some period of time with that point in mind, is that not true?

"A. Well, I've been as active as the people in Tazewell and New Tazewell have asked me to be. Let me qualify that. I haven't been either. If I had been as active as they have asked me to be, I don't believe there would be a KU customer left in Tazewell or New Tazewell.

"Q. And as a matter of fact, this system is really part of the Powell Valley system today, is it not?

"A. No, I don't think you could say that. I think they could still do anything they want to.

"Q. Is this not just like any other membership [fol. 823] situation on wholesale rate?

"A. No, I doubt seriously if you will find another one like this in the world."

Mr. Rowntree: Line 23, page 88.

"Q. All right. One more thing. Could we get a list of customers of the towns? I suppose this is the only place we can get it, who the customers are that the bills are being collected for the towns?

Mr. Rowntree: Skip to line 21.

"Mr. Rowntree: All right, fine, if you will provide that as Exhibit 13."

That list was provided, and we would like to file that as——

The Court: List of customers of what?

Mr. Rowntree: Of the towns.

(Exhibit No. 67 was marked for identification and filed.)

Mr. Rowntree: And I don't believe there's any need in reading it except to point out that there are—well, we can make such comment later in the argument.

We requested that that be up to date, up to the date of this deposition which was August 20, 1964.

I believe that's all.

[fol. 824] Mr. Marshall: If the Court please, at this time and in an effort to shorten the proceedings somewhat, we offer to read into evidence a number of documents pertaining to discovery from the defendants. The originals of these documents—I say originals, all of them are photostatic copies—photostatic copies were filed with the deposition of Mr. House to the extent that they have not been filed with the deposition of Mr. Miner previously read.

I think it might facilitate matters if we read all the way through and then hand the exhibits in at one time, if that is agreeable.

These are in chronological order.

First is a memorandum dated September 1, 1961, from C. Wilson House, District Manager, Eastern District, TVA, in Knoxville, addressed to Manager's File, Subject: Meeting with Representatives of Claiborne County, Tennessee, Chamber of Commerce.

Mr. Pedersen: Would you give me the date on that again?

Mr. Marshall: September 1 of '61.

Mr. Pedersen: Thank you.

Mr. Marshall: "Meeting was held in my office on August 15, 1961, to discuss future power supply in Claiborne County."

[fol. 825] The Court: Mr. Marshall, now I have read all of those exhibits, I think. I thought it was a discovery deposition. I have read the depositions that Mr. Rowntree has read, and if those exhibits were part of that deposition or any of those depositions, I have read them. Now if you want to read them again, it's all right.

Mr. Marshall: No, sir, if the Court has read them all, I think we will—shall we just identify what we are filing as exhibits?

The Court: Yes, sir, unless the other side wants to read them or read any parts of them. You may repeat the reading of any parts that you think are important.

Mr. Marshall: No, sir, if the Court has had a chance to read all of these documents, these memoranda of meetings and so forth——

The Court: Now they were part of the file in the Clerk's office, werent' they?

Mr. Rowntree: Yes, sir, they were filed as depositions and the exhibits were filed with the depositions. They are part of the record in the case.

The Court: Of the deposition that you have just read?

[fol. 826] Mr. Rowntree: The deposition I just read had a separate envelope of exhibits.

The Court: Didn't Mr. House give a deposition?

Mr. Rowntree: He gave a deposition.

The Court: I read that deposition. Are these exhibits that he filed?

Mr. Rowntree: These are the exhibits to his deposition.

The Court: I have read them.

Mr. Marshall: All right, sir. I'm trying to think now of the most——

The Court: For the record, I think you should——

Mr. Marshall: State which ones——

The Court: Yes, sir.

Mr. Marshall: Shall we just consider that they have been read into evidence?

Mr. McCarthy: Yes, sir. I'd like to see a list of the exhibits though. There might be one or two of those we want to object to. I'm not sure.

Mr. Marshall: Suppose I just read out loud to the reporter a description of what we are filing and give each one a number. Is that agreeable?

If the Court please, this first one is a poor photostat, just a one-page letter. I might read that in.

The Court: Now I didn't read that.

[fol. 827] Mr. Rowntree: That is not an exhibit to House.

The Court: Well now, I think there's another one in there like that that I didn't attempt to read.

Mr. Marshall: Pretty hard.

The Court: Yes, sir.

Mr. Marshall: We pored over them.

The Court: You better read any of those blurred exhibits like that.

Mr. Marshall: All right.

The Court: If you want to be punished.

Mr. Marshall: We offer as Exhibit 68, and will read into the record copy of a letter from Mr. F. E. Berry, Manager of Powell Valley Electric Cooperative, to Mr. Dewey—looks like S. Hunter, Executive Director, Lafollette

Housing Authority, Lafollette, Tennessee, dated March 3, 1961.

Mr. McCarthy: If the Court please, we object to this letter. This is a carbon copy of a letter which—it is a carbon copy which TVA supplied in response to interrogatories which asked us for everything on file. We don't know whether this original letter was ever sent or not. All we know was that our files contained what purported to be a carbon.

The Court: And who wrote the letter?

Mr. McCarthy: It's a letter from somebody in [fol. 828] Powell Valley to——

Mr. Marshall: It's a letter from the Manager of Powell Valley to the Executive Director of Lafollette Housing Authority.

Mr. McCarthy: Mr. Berry is deceased.

Mr. Marshall: Mr. Berry is now deceased.

The Court: Well, Mr. McCarthy, the fact that you had it in your files lends some dignity to it. Unless it's connected with some of the issues of the lawsuit and unless it appears that the writer actually wrote it, then it will not be given any consideration. But I would think that the fact that you had it in your files would make it prima facie evidence that it had some reliability.

Mr. McCarthy: Your Honor, we have fairly voluminous files. I certainly wouldn't vouch for the fact that such a letter was ever sent by reason of the fact it was in our files and the only basis on which material we supplied is, admissible is that we vouch for the authenticity of it, and we don't vouch for that.

The Court: No, you will not be held to have vouched for it at all. Not at all, and Mr. Marshall, now you see the point. You see the point. Should the Court give any [fol. 829] credence to a letter like that unless it's connected up?

Certainly it shouldn't prejudice the rights of TVA.

Mr. Marshall: We can put a witness on who will give thoroughly competent testimony of a conversation with Mr. Berry so consistent with this letter as to give it, I think, sufficient weight for the Court to consider the letter.

The Court: I'll let it go into the record subject to the objection of Mr. McCarthy, and if it becomes necessary

to pass upon its admissibility for any purpose in order to reach the merits of the case, the Court will do so.

Mr. Rowntree: What is the date?

Mr. Marshall: Dated March 3, 1961.

Mr. McCarthy: May it be understood that we also have an objection to anything else in the same category?

The Court: Yes, sir.

Mr. Marshall: If the Court please, Mr. Rowntree has just handed me a photostatic copy of another document furnished by TVA which is of a letter from the Lafollette Housing Authority on its letterhead, not signed, but bearing the typed signature, Dewey S. Hunter, Executive Di-
[fol. 830] rector, addressed to Mr. S. E. Berry, REA Office, Jonesville, Virginia, and dated February 27, 1961. The copy of the letter from Mr. Berry I previously offered to read starts out by saying, "We wish to acknowledge receipt of your letter of February 27."

So here is a copy of the letter and what appears to be a copy of the reply to that letter, the copy being in TVA's file and the copy of the letter, original letter, also being there.

Mr. McCarthy: The second one is no better than the first. It purports to be a copy of correspondence between third parties.

Mr. Marshall: I think we will then offer a——

Mr. Ardery: Mr. Marshall, may I ask you a question about that. Was that S. E. or F. E. Berry?

Mr. Marshall: Looks like S. E. on the photostat, and Mr. Berry's initials, I believe were F. E.

Mr. Ardery: That's correct. This quite obviously was F. E. Berry, and there never was an S. E. Berry who was manager of Powell Valley.

Mr. Marshall: Reading then Exhibit 69, which is a copy of a letter from what appears to be a letter from the Lafollette Housing Authority.

"Dear Mr. Berry:

[fol. 831] "We plan to build two low-rent housing projects, one in New Tazewell and the other in Tazewell. The total number of units for both projects will be fifty-eight. Someone told us that we would have to

secure our utilities from the Kentucky Utilities Company. We don't like this because with the rate that they have we feel that it would impossible for us to heat these units with electricity. We have eight projects comprising several hundred units and they are all completely electric. We would hate to change this for New Tazewell and Tazewell, so won't you please take under advisement our request and see if there isn't some way that you can furnish the electricity for these two projects. Since these are public housing projects, I am sure you know that we are under the supervision of the government, and I know that the Public Housing Administration would be pleased to have you serve these two projects.

"Sincerely yours,

"The Lafollette Housing Authority
"Dewey S. Hunter
"Executive Director"

Next, Exhibit 68 purports to be a copy of a reply from F. E. Berry, Manager, Powell Valley Electric Cooperative, to Mr. Dewey S. Hunter, Executive Director of Lafollette [fol. 832] Housing Authority dated March 3, 1961.

"Dear Mr. Hunter:

"We wish to acknowledge receipt of your letter of February 27 relative to this Cooperative serving electricity to the proposed housing projects in New Tazewell and Tazewell, Tennessee.

"Several weeks ago I looked over the site that your Authority had purchased in New Tazewell, and upon returning to our office I found that it was not in the territory which we are allowed to furnish service. It is true that we sell electricity under Standard TVA Rates which are much lower than the rates in this area for those consumers receiving service from the Kentucky Utilities Company.

"If you have not purchased your building site in the Tazewell area, we will be glad to furnish you with a map of the area in and around Tazewell which we are allowed to furnish service. As you know, the areas which public utilities can serve come under the jurisdiction of the

State Utilities Commission of Tennessee, and whether we like it or not, these restrictions must be strictly adhered.

"We would certainly like to serve these housing projects as we have the electricity available in this area and it would improve our winter load immensely.

[fol. 833] "Sincerely yours,

"F. E. Berry, Manager

"Powell Valley Electric Cooperative"

The Court: Now, Mr. Marshall, what is the direct purpose for these exhibits?

Mr. Marshall: This, when we couple it with the testimony that I mentioned, will constitute an acknowledgement by Mr. Berry of the effectiveness of the service maps or at least their accuracy in definding service areas prepared by Mr. Rowe and Mr. Osborne. That's what the testimony will be.

Mr. Ardery: If Your Honor please——

The Court: Then you seek to put those in the record for the limited purpose of showing that there was a purported agreement between Powell Valley and the towns?

Mr. Marshall: No, sir.

The Court: And KU with respect to service in certain areas?

Mr. Marshall: Not so much an agreement as a recognition by the manager of Powell Valley that these maps accurately set out service areas in fact.

The Court: Yes, Mr. Ardery?

Mr. Ardery: If the Court please, I would like to call [fol. 834] to the Court's attention that this was prior to the termination of the '58 agreement. This was Mr. Miner's predecessor as manager, and when Mr. Miner came in as manager of the cooperative, we effectively, we say, terminated that agreement.

The Court: All right.

(Exhibits No. 68 and 69 were marked for identification and filed.)

Mr. Marshall: Exhibit 70, dated September 1, 1961——

Mr. McCarthy: Excuse me just a moment. I got lost. I don't have a 69.

Mr. Cridlin: 68 was Berry to Hunter and 69 was Hunter to Berry.

[fol. 835] Mr. Marshall: A memorandum dated September 1, 1961 by Mr. C. Wilson House, District Manager, Eastern District of TVA in Knoxville, addressed to Manager's File, concerning a meeting held in Mr. House's office on August 15, 1961.

(Exhibit No. 70 was filed.)

The Court: The purpose, as I understand it, of all of those exhibits, is for whatever bearing they may have on the charge that the TVA and the Co-op and the towns were working in concert to put the private utility out of business; isn't that the purpose?

Mr. Marshall: Yes, sir.

The Court: All right.

Mr. Marshall: Exhibit No. 71, a memorandum dated April 18, 1962 by Mr. House of the TVA addressed to Manager's Files with respect to a meeting held at Cedar Grove on April 12, 1962.

(Exhibit No. 71 was filed.)

Mr. Marshall: Exhibit No. 72, a memorandum from Mr. House to Mr. Paul S. Button, Director of Power Marketing, Chattanooga, TVA, dated October 17, 1962 concerning advice given to Mr. House by Mr. Miner, manager of Powell Valley.

(Exhibit No. 72 was filed.)

[fol. 836] Mr. Marshall: Exhibit No. 73, a menorandum from Mr. House to Mr. Button, dated October 18, 1962, concerning the LaFollette Housing Authority, which is the subject of the two letters, Exhibits 68 and 69.

(Exhibit No. 73 was filed.)

The Court: Now, Mr. Counselor, what is the—what connection does the LaFollette municipal system have with the controversy, according to your contention?

Mr. Marshall: May I read a sentence out of Mr. House's memorandum?

The Court: Well, you claim that—I just want to know

State Utilities Commission of Tennessee, and whether we like it or not, these restrictions must be strictly adhered.

"We would certainly like to serve these housing projects as we have the electricity available in this area and it would improve our winter load immensely.

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Mr. Ardery: If Your Honor please——

The Court: Then you seek to put those in the record for the limited purpose of showing that there was a purported agreement between Powell Valley and the towns?

Mr. Marshall: No, sir.

The Court: And KU with respect to service in certain areas?

Mr. Marshall: Not so much an agreement as a recognition by the manager of Powell Valley that these maps accurately set out service areas in fact.

The Court: Yes, Mr. Ardery?

Mr. Ardery: If the Court please, I would like to call [fol. 834] to the Court's attention that this was prior to the termination of the '58 agreement. This was Mr. Miner's predecessor as manager, and when Mr. Miner came in as manager of the cooperative, we effectively, we say, terminated that agreement.

The Court: All right.

(Exhibits No. 68 and 69 were marked for identification and filed.)

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Mr. Cridlin: 68 was Berry to Hunter and 69 was Hunter to Berry.

[fol. 835] Mr. Marshall: A memorandum dated September 1, 1961 by Mr. C. Wilson House, District Manager, Eastern District of TVA in Knoxville, addressed to Manager's File, concerning a meeting held in Mr. House's office on August 15, 1961.

(Exhibit No. 70 was filed.)

The Court: The purpose, as I understand it, of all of those exhibits, is for whatever bearing they may have on the charge that the TVA and the Co-op and the towns were working in concert to put the private utility out of business; isn't that the purpose?

Mr. Marshall: Yes, sir.

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(Exhibit No. 72 was filed.)

[fol. 836] Mr. Marshall: Exhibit No. 73, a menorandum from Mr. House to Mr. Button, dated October 18, 1962, concerning the LaFollette Housing Authority, which is the subject of the two letters, Exhibits 68 and 69.

(Exhibit No. 73 was filed.)

The Court: Now, Mr. Counselor, what is the—what connection does the LaFollette municipal system have with the controversy, according to your contention?

Mr. Marshall: May I read a sentence out of Mr. House's memorandum?

The Court: Well, you claim that—I just want to know

what—is it your position that the LaFollette system was a co-conspirator?

Mr. Marshall: No, sir, not at all.

The Court: What is it? What is the purpose of bringing in that system?

Mr. Marshall: Mr. Welch suggested maybe the two names "LaFollette" that have come into this thing and could be confusing.

There is a LaFollette Electric Board which is a TVA distributor in the western part of Claiborne County. That is not the LaFollette here.

This is a different LaFollette. LaFollette Housing Au- [fol. 837] thority that constructed a multi-unit housing project in New Tazewell.

The Court: New Tazewell?

Mr. Marshall: Yes. The only point in bringing LaFollette Housing into this is that Mr. Berry acknowledged that these maps accurately set out service areas of these utilities by agreeing to not serve LaFollette and recognizing that the LaFollette Housing projects was in KU's service area.

The Court: Well, the LaFollette municipal system is not in the case; it is the Housing Authority.

Mr. Marshall: No, the LaFollette Housing Authority is not in it. It is just the subject—it was the subject of a controversy between these two utilities that was resolved on the basis of these Rowe-Osborne maps.

The Court: I see. All right. You may read what you started to if you want to.

Mr. Marshall: This was just in Mr. House's memorandum to Mr. Button concerning this Housing Authority.

"Under the territorial agreement between the cooperative and KU, effective January 16, 1958, both of these projects are in KU's territory. As I advised you yesterday, the cooperative has notified KU of termination of this [fol. 838] letter agreement on January 16, 1963."

I would like to read one more paragraph in that same memorandum.

The Court: You are reading from what exhibit?

Mr. Marshall: Exhibit 73, Mr. House of TVA to Mr. Button of TVA.

"As you know, the letter agreement dated August 22, 1952, between the cooperative and KU only stipulates that during the term of the tri-party agreement neither the cooperative nor KU will serve any customer who is receiving service from the other party."

Exhibit No. 74 is a memorandum by Mr. C. Wilson House of TVA to Manager's Files, dated November 19, 1962, having as its subject the November 15, 1962 meeting among representatives of TVA and representatives of Powell Valley.

(Exhibit No. 74 was filed.)

Mr. Marshall: If the Court would indulge us I would like to read this one memorandum.

The Court: Mr. Marshall, do not let what the Court said cut you off from reading any part of these exhibits that you want to, and that applies to your adversary also. [fol. 839] Mr. Marshall: I don't want to belabor points but this is of significance. I want to select this one to read to you, if I may.

Again it is by Mr. House of TVA to the TVA Manager's Files, dated November 19, 1962, subject: Meeting with Powell Valley Electric Cooperative—Relative to Tazewell and New Tazewell.

"Messrs. T. Graham Wells, Jr., C. A. Reidinger, and the writer met with Ralph B. Miner, Manager, and Clyde Y. Cridlin, Attorney, of the Powell Valley Electric Cooperative, in the writer's office on November 15, 1962. The purpose of the meeting was to discuss the possibility of Tazewell and New Tazewell obtaining TVA power and what action should be taken at this time. Mr. Miner said the people and city councils of the two cities are anxious to obtain TVA power.

"Mr. Miner said, while in Washington recently, REA had advised him that REA could not grant a loan to the cooperative to serve the two cities but the cooperative could use its general fund.

"TVA representatives advised the cooperative that a decision should be made as to whether the cooperative or the two cities will undertake to purchase Kentucky Utili- [fol. 840] ties' facilities and, if that fails, to build a com-

peting system. The letter agreement between the cooperative and Kentucky Utilities, which is still in effect and is a part of tri-party agreement,"——

If I may pause, that is the letter agreement of August 1952 which the defendants have said during the trial of this case was no longer in effect but was superseded by the letter agreement of January 1958.

The Court: The letter you are reading from was written by whom?

Mr. Marshall: By Mr. House, District Manager, Eastern District, TVA.

The Court: And dated?

Mr. Marshall: Dated November 19, 1962.

The Court: And addressed to whom?

Mr. Marshall: To Manager's File.

The Court: All right.

Mr. Marshall: "The letter agreement between the cooperative and Kentucky Utilities, which is still in effect and is a part of tri-party agreement, might cause some difficulty if cooperative should start a competing system.

"Regardless of who plans to initially serve the area, it [fol. 841] was recommended that an engineering firm be employed to make an evaluation of the KU properties. It was agreed that probably the area to be considered would be that area now served by KU out of the Tazewell Substation, which includes Tazewell, New Tazewell, and some rural customers in the vicinity and on Highway 25E as far northwest as the Powell River. It was suggested by TVA representatives that, first, an offer should be made to KU for the purchase of facilities and customers, and if KU refuses to sell, then start building a duplicate system at once.

"It was pointed out that if the cities plan to serve the area initially, they would need to have their financing arrangement made, and an agreement with the cooperative providing for the operation of the system.

"We suggested that the cooperative's attorney become familiar with cooperatives laws in Tennessee and also determine the best method for the cooperative to purchase the system from the cities if it is initially acquired or constructed by the cities. He should also determine

if it would be possible and feasible for the cooperative to purchase cities' revenue bonds.

"In connection with Hammond Fowler's"——

[fol. 842] I might identify Mr. Fowler. He is Public—he is Tennessee Public—you know him. All right.

The Court: Everybody knows him.

Mr. Marshall: Sorry.

"—letter dated October 5, 1962, to Mr. Kievll, an attorney in Tazewell, Mr. Reidinger"—Mr. Reidinger is the TVA lawyer mentioned—"recommended that the cooperative and the two cities should request a hearing before the Tennessee Public Service Commission on any territory boundary which might be applied for by KU. He further suggested that the two cities pass resolutions that it is to the public interest for the cities to either purchase KU facilities or build a competing system; the Public Service Commission should be requested to deny KU a certificate of convenience and necessity, and should order KU to either reduce its rates to the level of the cooperative rates or sell its facilities to the cooperative in the public interest.

"TVA representatives told Mr. Miner that a meeting with two or three representatives from each of the two city councils (Tazewell and New Tazewell) would be preferred to a meeting with the Claiborne County Chamber of Commerce as requested. He will make arrangements for this meeting to be held in writer's office on Tuesday, November 27 at 1:30 p.m.

[fol. 843] "The cooperative representatives requested that TVA advise them if TVA will provide a delivery point to the cooperative (and also to the cities if necessary) in the vicinity of Tazewell in the event KU is not willing to continue to deliver power to Tazewell on an interchange basis."

Signed by Mr. House.

Exhibit No. 75, a memorandum from Mr. Paul S. Button addressed to Mr. T. Graham Wells, both of TVA, dated November 20, 1962 with respect to the supply of power to Tazewell and New Tazewell.

Attached to Exhibit 75 and filed as a part is the memo

from Mr. K. E. Hapgood, Director of Power Planning and Engineering, TVA, to Mr. Paul S. Button dated November 23, 1962.

(Exhibit No. 75 was filed.)

Mr. Marshall: Exhibit No. 76 is a memorandum from Mr. House to TVA Manager's Files, dated November 28, 1962, having as its subject meeting held on November 27, 1962 in Mr. House's office.

(Exhibit No. 76 was filed.)

Mr. Marshall: Exhibit No. 77, a memorandum by Paul S. Button to TVA Manager's Files dated December 5, 1962, concerning discussion with the TVA Board on [fol. 844] November 27, 1962 with respect to the supply of power to this area.

(Exhibit No. 77 was filed.)

Mr. Marshall: I might read one sentence from this:

> "Recently, the cooperative has given notice of termination to the Kentucky Utilities Company of a territorial agreement between them. This agreement would have precluded further service by the cooperative in the town."

The Court: What is the date of that letter?

Mr. Marshall: December 5, 1962.

The Court: And who wrote it?

Mr. Marshall: Mr. Button, Director of Power and Marketing of TVA.

Mr. Pedersen: What are you reading there? I didn't follow you.

Mr. Marshall: (Conferring with counsel.)

Exhibit No. 78, a memorandum from Mr. Van Mol, General Manager of TVA, to Mr. Wessenauer, Manager of Power, TVA, dated December 10, 1962 concerning TVA Board of Directors action with regard to supply of power to Tazewell and New Tazewell.

(Exhibit No. 78 was filed.)

Mr. Marshall: Exhibit No. 79, a letter from Mr. C. Wilson House of TVA to Mr. Ralph Miner, Manager,

[fol. 845] Powell Valley, dated December 14, 1962, concerning a meeting held in Mr. House's office on November 27, 1962.

(Exhibit No. 79 was filed.)

Mr. Marshall: The last sentence of that letter is:

> "We assure you that TVA will continue to provide your cooperative's future power requirements in the vicinity of Tazewell."

Exhibit No. 80, a memorandum from Mr. House to Mr. Button, both TVA, copy to Mr. Reidinger, a lawyer with TVA, dated June 20, 1962.

(Exhibit No. 80 was filed.)

Mr. Marshall: I would like to read one sentence out of that letter. First the sentence that Mr. Miner had discussed with the mayors the items to be included in a letter agreement, and:

> "They decided it was best that no letters be written (including TVA's letter to cooperative, advising town can be served by TVA power) until after they talk (and employ, we hope) with Ardery."

Exhibit No. 81, a letter from Mr. Miner to Mr. House, dated August 26, 1963, this being a formal letter in which Mr. Miner requested assurance of TVA power.

[fol. 846] Mr. McCarthy: What is the date of that last one?

Mr. Marshall: August 26, 1963.

(Exhibit No. 81 was filed.)

Mr. Marshall: Exhibit No. 81 consists of that letter from Mr. Miner to Mr. House and a letter from Mayor Hardin to Mr. Miner dated August 14, 1963, which was enclosed with Mr. Miner's letter, and a memorandum from Mr. House to Mr. Button dated August 27, 1963, attaching copies of those two letters.

[fol. 847] Mr. Marshall: Exhibit 82, letter from the two mayors of the two towns to Mr. Miner dated September 11, 1963, again requesting that Powell Valley confirm to

the cities its ability and willingness to provide the so-called municipal system with power;

Also Mr. Miner's letter to Mr. House dated September 13, 1963, forwarding the letter from the mayors;

Also Mr. House's memorandum to Mr. Button dated September 16, 1963, forwarding both of those letters to Mr. Button;

And finally Mr. House's letter to Mr. Miner dated September 23, 1963, advising that TVA will continue to make power available.

Mr. Ardery: Is that all one number?

Mr. Marshall: Yes, sir.

(Exhibit No. 82 was marked for identification and filed.)

Mr. Marshall: I might read one sentence of the last clause in that letter saying that TVA will make power available, quote, "if an appropriate lease or purchase arrangement is developed so that the consumers will be served as a part of the Powell Valley Electric Cooperative system."

Mr. McCarthy: Which one are you reading from?

[fol. 848] Mr. Marshall: Mr. House to Mr. Miner, September 23, 1963.

Exhibit 83——

Mr. Rowntree: Now this one, Your Honor, is not an exhibit to House. This was produced by TVA, but it's not an exhibit in House's deposition.

Mr. Marshall: It is a letter from Mr. Miner to Mr. House dated December 26, 1963, concerning preparation of some maps, I take it, for use in the trial, contains a statement:

> "We found it nearly impossible to locate each house on the map—" there's a reference in the preceding sentence to the KU system. "We found it nearly impossible to locate each house on the map due to the density on most of their system, so we have marked it off in sections."

Mr. Ardery: What number is that, Mr. Marshall?

Mr. Marshall: 84.

Mr. Ardery: Isn't that 84?

Mr. Marshall: No, it's 83.

(Exhibit No. 83 was marked for identification and filed.)

Mr. Marshall: 84, letter from Mr. Miner to Mr. House dated March 18, 1964.

(Exhibit No. 84 was marked for identification and filed.)

[fol. 849] Mr. Marshall: Exhibit 85, letter from Mr. Miner to the two mayors dated September 24, 1963, finally confirming the availability of power.

(Exhibit No. 85 was marked for identification and filed.)

The Court: Now, Mr. Marshall, I think that I understand your contention with respect to the agreement of 1962, between the co-op and the private utility to the effect that neither would trespass upon the customers of the other. I believe I understand the contention of the towns that that agreement was abrogated in 1958 by one of the managers, Mr. Miner, and in addition, the towns say that it is no good anyhow, because it violates the antitrust laws.

Now you continue to refer to this tri-party agreement. Now who were the three parties? KU and the co-op, and the TVA?

Mr. Marshall: Yes, sir.

The Court: All right, and when and where was that made, and what was the agreement according to your contention?

Mr. Marshall: The tri-party agreement was entered into as you say between TVA, Powell Valley, and KU, in 1962. The agreement relates to details of service, how they are going to serve this area, not service areas, not [fol. 850] service area agreements in the tri-party agreement, but engineering details of getting the supply of power to this area for both Powell Valley and KU.

Before that agreement was signed—I believe it is dated in October of 1952—as a part of it and before it was signed, Powell Valley and KU entered into a letter agreement which says that it will be effective for the term of the tri-party agreement, and that letter agreement is the one that says that neither will take the customers of the other.

Now I don't think it's quite the position of any defend-

ant that that letter agreement of 1952 which simply said "we won't take each other's customers", I don't believe they say that that was ever expressly terminated by any later letter.

What they say, as I understand their position, is that the agreement which was entered into in January, 1958, and which was broader, superseded the 1952 agreement. The 1958 letter agreement came along, and in addition to saying "we won't take each other's customers," it said that "we will serve new loads on the basis of who is closest to them". It was that kind of an agreement. It was broader than the '52 letter agreement.

The Court: Now TVA had no part in that?

[fol. 851] Mr. Marshall: In the 1958 agreement?

The Court: No, about not taking each other's customers. It was just kind of an umpire between your company and——

Mr. Marshall: I would say that there's no evidence that goes that far. I would say that the evidence is simply that Powell Valley and KU were parties to this letter agreement which said that it ran for the term of the tri-party agreement, and the tri-party agreement is still in effect.

The Court: And TVA knew about it, you say?

Mr. Marshall: I'm trying to confine myself, in answering you, to the evidence. I think it is a fair statement to say that TVA knew about it.

Mr. Rowntree: The fact of the matter——

The Court: Why do we call it a tri-party if only the co-op and the private utility were part of it?

Mr. Marshall: We don't refer to the letter agreement as the tri-party agreement. The tri-party agreement is the big agreement for this service.

The Court: Was all that reduced to writing?

Mr. Marshall: Yes.

The Court: And is it in the record?

[fol. 852] Mr. Marshall: No, I don't think anybody has ever filed the tri-party agreement.

The Court: Is each side afraid to file it, is that the idea?

Mr. Marshall: No, sir, it's not that. There's broader litigation due to some of the factors in this tri-party agreement. It's the point that Mr. McCarthy and I have been

discussing. There are much broader issues between these parties in another lawsuit. I think we are both fairly agreed that these facts are not controlling in this lawsuit.

The Court: Yes.

Mr. McCarthy: We will be glad to put in the tri-party agreement as part of our case, Your Honor.

The Court: Mr. McCarthy, I don't ask you to. He continues to refer to it, and I just want to know what it was about.

Mr. McCarthy: It's an agreement that arose, because, as Mr. Marshall says, of operating problems up in Tazewell. TVA has interconnection agreements with a lot of the neighboring utilities. Where it is more convenient for both parties, for neighboring utilities to supply the power for our account, they do it, and we have arrangements of that kind with KU at different points, and with other utilities all around the system, and this tri-party agreement was an agreement between TVA and KU and Powell Val- [fol. 853] ley under which it was agreed that instead of the TVA building a line into Tazewell, KU would build it, and Powell Valley would build the substation.

Now this agreement between Powell Valley and KU is no part of that tri-party agreement. It is a separate agreement to which TVA is not a party and it provides that during the life of the agreement—and the agreement is the letter agreement, not the tri-party agreement—the term of the letter agreement is not stated, it simply says during the life of this agreement, neither party shall take a—well, I can read it to you.

"During the term of this agreement, neither Powell Valley Cooperative nor the Dixie Light and Power Company will serve any customer who is receiving service from another party."

The Court: Now is that a letter that you are reading from?

Mr. McCarthy: This is the '52 letter agreement.

The Court: Letter agreement between——

Mr. McCarthy: Powell Valley and KU.

The Court: KU and the co-op?

Mr. McCarthy: That's right.

The Court: All right.

Mr. McCarthy: It's our contention that if this [fol. 854] agreement was valid originally, it was completely superseded by a later agreement in 1958, which covers exactly the same subject matter, and which is broader in its terms. It gives KU greater protection than this does, and which provides that it will be continued for five years and be subject to cancellation at the end of the five-year period.

Our position is that that '58 agreement has been cancelled, the '58 agreement cancelled out the '52 agreement, but there isn't any agreement in existence now between Powell Valley and KU. We further say, of course, that even if there were, nothing has been done by any of the parties which would constitute a violation.

The Court: All right.

Mr. Marshall: Now if I can respond very briefly, I'll hold it down.

The letter agreement between KU and Powell Valley contains the statement—this is a letter written initially by the manager of Powell Valley:

If the statement that we won't take each other's customers, "If this statement also satisfactorily expresses your desires, we would appreciate very much your acknowledgment by the return of one copy of this letter in order that [fol. 855] we may feel free to execute the tri-party agreement and forward it to TVA for completion."

Mr. McCarthy, I think, is entirely accurate when he says that TVA was not a technical party to this letter agreement. We don't say it was, but we do say this was integrally tied together with the tri-party agreement to the point where the parties wouldn't sign the tri-party agreement until they agreed upon the wording of this agreement between KU and Powell Valley.

Insofar as the point that this document, the letter agreement between the two utilities, was superseded by the January, 1958, agreement, we just don't feel there's anything in that argument at all except argument, and we offer Mr. House's acknowledgment that this agreement was still in effect four years after the 1958 agreement was made.

The Court: Well, what is the result of the agreement that the area was fixed between the parties as of July the 20th, 1957?

Mr. Marshall: I can't say that is the result of this agree-

ment. One of the principal results and effects of this agreement and the reason we talk about it is that the defendants themselves felt, during all of these meetings going on in 1962, that this agreement precluded Powell Valley from [fol. 856] acting in its own name to build this system, and all through these documents that we have filed the defendants in these meetings have said, because this agreement right here, the '52 agreement is still in effect, we can terminate the 1958 agreement, and they acted and undertook to do that, but their view, as set out in their own memoranda, was that because this 1952 agreement was still in effect, Powell Valley could not act in its own name.

They had to go through the fiction of having the cities take this system, take our customers, as they said initially, with the precise plan for Powell Valley then to take them over, because this was in effect, they couldn't—Powell Valley couldn't take our customers directly, and they were so concerned, and in their own memoranda, so tied this piece of paper with this tri-party agreement, that they considered that if they acted contrary to this 1952 letter agreement to take our customers in Powell Valley's name, we might consider that a violation of the tri-party agreement and discontinue transmitting power in there under the tri-party agreement with the result that TVA would have to build expensive transmission in there itself, and that's the subject of the November 27, 1962, TVA Directors' meeting at which they approved spending five hundred thousand to seven [fol. 857] hundred and fifty thousand dollars to build that transmission in. If, as a result, as they themselves put it, the violation of this agreement, we then concluded they had acted contrary to the whole tri-party agreement——

[fol. 858] Mr. McCarthy: May it please the Court, this is not the time to argue the case, but I do want to comment on what was said.

The Court: I am just trying to get the position of the respective parties.

Mr. McCarthy: It has been the position of the parties throughout that this 1952 agreement was cancelled by the 1958 agreement. We recognize that there is a legal question involved, but I don't think the Court is going to be held—is going to hold that TVA is bound by some casual state-

ments made in a memorandum by one of its employees who was not responsible for construing this agreement.

The Court: Mr. McCarthy, I can't see, so far, why so much stress is put on the 1952 agreement and the 1958 agreement. It seems to me that this—a proper interpretation of this, the latest Act passed by Congress authorizing TVA to issue these bonds—what is the date of it?

Mr. Marshall: 1959.

Mr. McCarthy: 1959.

The Court: Is going to control the rights of the parties. And I can't see, out of deference to counsel, Mr. Marshall, I can't see how these agreements in 1952, the 1952 agreement, would have such importance as he is putting on it [fol. 859] except to establish the area to be served by the private utility and the co-op.

Mr. Rowntree: May I speak on that?

The Court: Because the municipalities were not parties. And in the 1958 agreement, I can't see how that has so much to do with the lawsuit.

This is not a suit for breach of contract, as I understand it.

Mr. McCarthy: No.

The Court: Isn't the great stress you are putting on it that the co-op could not go into these towns because they had an agreement that they wouldn't and therefore they tried to go a circuitous route through the towns? They were putting these towns, these towns who were inexperienced in the boundaries or the transmission of electrical current out in front and that this co-op was staying behind, saying, "You go out and if you get hurt I will come to your rescue."

I can't see how that has so much to do with this lawsuit. I may be wrong.

Mr. McCarthy: I don't think it has anything to do with the lawsuit either, your Honor, but I have construed Mr. Marshall's position as being that even if they are wrong on [fol. 860] the meaning of the TVA Act they still have a cause of action here for breach of contract and that is the only thing these '52 or '58 agreements could have any such bearing. I don't think they have any bearing on the question of territory.

The Court: And the suit is not for breach of contract.

Mr. McCarthy: Well, I am not sure whether it is or not.

I have gone on the assumption that that is an alternative claim that is being presented here. Mr. Marshall will have to answer that.

The Court: Mr. Rowntree, I will hear you. Frankly, I think—I am not going to cut you off but you are emphasizing something, and if I am wrong you had better get me right before the case ends—you are emphasizing something that I don't think, up to this time, has so much pertinency to the controlling points in this lawsuit.

Now if you fix the area, if the area was fixed between the town and between the co-op and private utility in 1952, then that might be persuasive that this 1952 Act confined that area that was fixed by these parties and that they are stopped there as a matter of conscience and matter of equity and waiver, and all that kind of thing, to raise that [fol. 861] question.

I could see how it would be pertinent on that point but on the point Mr. Marshall has brought out here, and it may be good, I don't know—it is a new point to me.

I just now caught the point that he was making when he made his last observation, but I can't see that it is a weighty point in the controlling issues in this lawsuit.

Mr. Rowntree: If your Honor please, I think it is a two-fold thing we are saying here. The point that your Honor makes is primary and overrides everything else, that there was an area boundary fixed. It was fixed as of the time of the 1959 Act.

The Court: I can see that point may have power and may be the controlling fact in this lawsuit.

Mr. Rowntree: Then we think the legislative history shows how strong Congress felt about such boundaries as those that were fixed in these sorts of agreements. That permeates the legislative history of this thing. But we secondly do contend that there is before the Court a common law conspiracy in addition to the federal law conspiracy; that is, that there were certain rights being violated by the conspiracy that we have charged under the common law [fol. 862] charge. And we feel that when a party conspires to void and set aside his own contractual obligations by an arrangement he makes with co-conspirators, that that comes under the common law charge of conspiracy.

I think Mr. Marshall is pointing out that phase of it, that

goes to the common law part of this thing regardless of the interpretation finally placed upon the TVA 1959 Act.

We do have a common law conspiracy here which involved the effort of Powell Valley by working with co-conspirators to void and do away with by arrangements made with the town mayors and the TVA to supplant and do away with its contractual obligation which confronted it that it could not take the customers of Kentucky Utilities itself. So it let somebody else slip in and take those customers with the ultimate plan of taking over thereafter.

That contention is being confined to the common law count, but we think the over-riding point on these agreements is the boundary which was fixed, which was defined as the boundary within the 1959 Act.

The Court: Well, if, as you say, and the Court of course is not intimating anything on these factual matters, it [fol. 863] doesn't know, but if you are saying that the co-op "fudged," that is what we say in East Tennessee, on its agreement, how would that add—and tried to use the city to get out of its agreement wrongfully, how would that add to a common law conspiracy? From a legal standpoint or a factual standpoint what does it add to it?

Mr. Rowntree: It shows over-all purpose. We think the purpose was unlawful. A conspiracy could be unlawful by reason of purpose or by means.

Now we think the purpose here is unlawful because they were conspiring to run KU out of that area. It was also wrongful because they were trying to avoid, slip around the back side, and do away with their contract obligations.

I think that is really what it gets down to, the basic point under the common law conspiracy.

The Court: Now do you really think, Mr. Rowntree, with your colleague, that the Court must put stress on the question of whether the 1958 agreement was in effect or not in effect at the time this lawsuit was started or before?

Mr. Rowntree: No, sir. Well, I do with regard to the common law conspiracy but I don't as to the federal violation of the TVA 1959 Act, because we think there the ques- [fol. 864] tion is was there a boundary existing at the time of the 1959 Act, was there a boundary existing at that time.

The Court: Well, as I see the case up to this time that is very important.

This other, Mr. Marshall, do you still stress your position on that 1958 agreement, that the Court is going to have to make a finding on that in order to reach the right answers in this suit?

I am trying to get out all the issues I can as we go along, but I don't want to get any issue out of the case that has any relevancy to the overriding issues, or an ultimate issue that would have to be decided.

I think this case maybe mostly is going to turn on questions of law. I think up to this time probably you could have stipulated all the proof that has been introduced, and I anticipate that the proof that will be introduced by the TVA the other people could stipulate on, maybe not.

Mr. Marshall: I think the facts as to the service area are going to be in very little disagreement. It would be difficult to stipulate because of the argument that will be developed before you on the application of the TVA act to those facts. [fol. 865] I don't believe we could have gotten too far in stipulating some of the material that each of us would have wanted to put before you in the case for a final decision. But I agree with you that the case is principally a 1959 Act case, but there is the common law conspiracy count.

The Court: Well, now tell me again your position on that 1958 agreement. That has me confused.

Mr. Marshall: I think part of the confusion, if the Court please, is there are two agreements we are talking about. There are two letter agreements we are talking about, both between KU and Powell Valley and not directly with TVA as a party.

There was first the 1952 letter agreement which said simply "we won't take each other's customers." That letter agreement was really entered into between the two parties under the existing condition of signing a new tri-party agreement, and it says so.

That letter agreement has never been directly cancelled by anybody. That letter agreement is referred to in all of the meetings among the defendants as late as 1962 as being a barrier, an obstacle, to Powell Valley to do what it wanted to do.

And so far as Mr. House not being the one to [fol. 866] interpret and decide whether that letter agreement was in effect, we have so many memorandum, I will

state this flatly, but I think Mr. House's notes of the meeting in which he said that that letter agreement of 1952 was still in effect and would prevent Powell Valley acting, was in a meeting where there were about three TVA lawyers present.

We don't want to overstress that point because we don't want to get away from what we feel, as you do, is the overriding issues in the case—service area, factually.

The Court: All right.

Gentlemen, let's take a recess.

(A short recess was had, after which the following proceedings were had.)

The Court: Gentlemen, you may proceed with the testimony.

Mr. Rowntree: May it please the Court, the parties have stipulated that the depositions of Mayor De Busk and Mayor Hardin may be considered as read into the proof, if that is agreeable with the Court.

The Court: It is agreeable with the Court. I have read those depositions. They were in the file and I read them.

[fol. 867] Mr. Rowntree: They were in the file. And that includes the exhibits filed to those depositions.

The Court: Now is there any point in the testimony of either of them that the Court's mind should be refreshed on?

Mr. Ardery: If your Honor please, I would like to consider that very seriously. We would certainly not like the Court to waste the Court's time. On the other hand, I think that there are certain factors that he testified to which are responsive to the proof that the plaintiff has put on which would be, in some cases, in addition to matters relative to the same things that they were examined on in discovery.

If we might, however, we would like to reserve a decision on that for the discussion with other counsel this evening and be prepared to inform your Honor about it in the morning.

The Court: Yes, you may. I think that, Mr. Ardery, I have read them, they were in the file, I have read both of them, but as I recall they just talked about the subject matter and I don't know of any particular part of it that is controlling in this lawsuit. I don't know. If there is, I

would like for it to be re-read to me. If either side feels [fol. 868] that there is any part of it, we will just treat it, the depositions, as having been read, if that is agreeable to all parties, with the right of either side before the case ends to read any part of the depositions or all of them if they want to.

Mr. Pedersen: Or to put the witnesses on to supplement what is in the depositions.

The Court: Yes, sir, either side may do that.

Mr. Pedersen: These are merely discovery depositions of the plaintiffs.

Mr. Marshall: And may we refer to the proof in those depositions the same as any other proof in our argument?

The Court: Yes, sir.

Mr. Ardery: If your Honor please, I mentioned to Mr. Marshall this morning, one of our mayors is stricken and is now in the hospital. I don't think he is in serious condition but I doubt he will be able to testify, and I mentioned to Mr. Marshall that I would like to call Mr. Stanifer as a witness in lieu of that mayor.

I did not get an answer one way or other but I generally gained the impression that there would be no strenuous objection about that.

[fol. 869] Mr. Marshall: I am sorry. I intended to agree to it. I thought I had. No objection.

Mr. Rowntree: May it please the Court, there are several exhibits filed late which we requested to be filed after the taking of the deposition of these two gentlemen, Mr. Hardin and Mr. DeBusk, which I would like to insert in the record at this time.

The Court: You may do so.

Mr. Rowntree: Exhibit No. 86 is the form of petition circulated by the town of Tazewell. That is No. 86.

(Exhibit No. 86 was filed.)

Mr. Rowntree: Exhibit No. 87, the bank statement received by Mr. Hardin for Tazewell pertaining to the power system.

Mr. Ardery: What was that?

Mr. Rowntree: That is the bank statement.

Mr. Ardery: Oh, yes.

Mr. Rowntree: I might say, Exhibit 86 is Exhibit 5 to the deposition of Mr. Hardin.

(Exhibit No. 87 was filed.)

Mr. Rowntree: Exhibit 87 is Exhibit 14 to the deposition of Mr. Hardin.

As Exhibit 88, we offer the bank statement received [fol. 870] by Mr. DeBusk for New Tazewell, which is Exhibit No. 7 to the deposition of Mr. DeBusk.

(Exhibit No. 88 was filed.)

Mr. Rowntree: We offer as Exhibit 89 the form of petition circulated in New Tazewell, which is Exhibit No. 2 to the deposition of Mr. DeBusk.

(Exhibit No. 89 was filed.)

Mr. Rowntree: We offer as Exhibit No. 90 the resolution or motion concerning the issuance of anticipated revenue note of the town of New Tazewell, which is Exhibit No. 5 to the deposition of Mr. DeBusk.

(Exhibit No. 90 was filed.)

Mr. Rowntree: there is also attached to that exhibit the record of action taken on May 14, 1963 with reference to the referendum which was rescinded, according to the record there. That is attached to Exhibit No. 90.

Mr. Marshall: We have only one more short witness before closing in connection with the copy of a letter from Mr. Berry that was in doubt. I told you I would put a witness on to give that subject weight, and I would like to call Mr. Howard Asher for just a few minutes.

The Court: All right.

[fol. 871] HOWARD ASHER, a witness on behalf of the plaintiff, having been previously sworn, was recalled, was examined and further testified as follows:

Direct Examination.

By Mr. Marshall:

Q. Mr. Asher, the service area maps which were prepared by Mr. Rowe and Mr. Osborne, I believe were completed in 1960?

A. Yes, sir.

Q. Did you have a conversation in early 1961 with Mr. F. E. Berry who was the manager of Powell Valley concerning service to the LaFollette Housing Authority project in New Tazewell and Tazewell?

A. Yes, sir, I did.

Q. What was the substance or the subject matter of that conversation?

A. The conversation was the result of a telephone conversation with Mr. Hunter with reference to some data and plans that were being prepared in connection with the two housing projects.

Q. Mr. Hunter being the executive director of the LaFollette Housing Authority?

A. Yes, sir, and in charge of the two proposed projects at Tazewell and New Tazewell.

[fol. 872] Q. And the conversation took place between you and Mr. Berry concerning electric service to those projects?

A. Well, Mr. Hunter advised me that he——

Q. Just a minute. I don't know whether——

A. —requested service from Powell Valley for the projects, and we had some discussion about that. However, I called Mr. Berry with reference to the situation and he said he had had an inquiry from Mr. Hunter with reference to providing service to the projects.

He said he had looked the situation over on the ground, and this was in the early part of 1961, I don't recall the exact dates, but he said he had looked the situation over on the ground and was very definite from the maps that

they were in the area of service where it would be provided by KU.

Q. Very definite from what maps?

A. From the territorial maps that we have been discussing and that were prepared by Mr. Rowe and Mr. Osborne.

Q. Same maps that are Exhibits 14 in the case?

A. Yes, sir.

Q. And so you and Mr. Berry in that telephone conversation resolved the question of service to the LaFollette projects on the basis of the map, Exhibit No. 14, is that an accurate statement?

A. He had already looked over the proposed location of the housing project and determined from the maps [fol. 873] and said he would so advise Mr. Hunter it was in the KU service area.

Mr. Marshall: That is all.

The Court: What is the letter to which Mr. McCarthy objected, who wrote it?

Mr. Marshall: It is——

The Court: What exhibit number is it?

Mr. Marshall: Exhibit No. 68.

The Court: And the letter written by——

Mr. Marshall: It appears to be a letter, this was a carbon in Mr. McCarthy's file from Mr. Berry, Manager, Powell Valley, to Mr. Hunter of LaFollette, advising him that he had considered the situation and that the project was in the KU service area, and he even refers to a map of the area in the letter.

The Court: All right.

Mr. Marshall: That is all, Mr. Asher.

Mr. McCarthy: No questions.

Mr. Ardery: No questions.

(Witness excused.)

PLAINTIFF RESTS

Mr. Marshall: That is the case for the plaintiff.

The Court: All right.

You want the jury excused?

[fol. 874] MOTIONS AND RULINGS THEREON

Mr. McCarthy: We move at this time to dismiss the action as to TVA, first, insofar as it is based on alleged conspiracy or breach of contract on the ground there has been absolutely no evidence submitted supporting such a claim.

Insofar as the action relates to the provisions of the TVA Act, we move to dismiss on the ground that the plaintiff has not shown violation of any right owed to it, has not established any facts which would entitle it to come into this court to sue or confer the jurisdiction of the court.

The Court: The Court is constrained to overrule the motion at this time.

Mr. Ardery: Would you let the record show that motion was made for the Court to dismiss the action against the towns and particularly, if your Honor please, against the Mayors as individuals because there has been no shread of evidence that they have acted in the capacity of an individual such as would cause them to be culpable for anything.

The Court: What relief is shown against the Mayors individually, if any?

Mr. Marshall: Basically, I would say the complaint seeks to enjoin the TVA from selling power to Powell Valley and [fol. 875] the other defendants from receiving and distributing it contrary to the provisions of the Act.

The Court: Are you asking any relief against the Mayors individually, in damages or anything of that kind?

Mr. Marshall: I have to check the prayer to give you an accurate answer.

Mr. Ardery: If your Honor please, they sue them as individuals, and I think there has been no proof against them as individuals. And, of course, I think the record should also note a motion to dismiss the action against Powell Valley.

The Court: Well, that motion against Powell Valley is overruled.

What about the Mayors individually?

Mr. Marshall: We have no particular feeling. They were put in here. We wanted everybody that had been a party to this matter available on discovery.

I don't think we have any particular objection to letting them out at this time as individuals.

The Court: The motion as to the Mayors individually is sustained and they are out.

Mr. McCarthy: May I amend my motion, your Honor?

The Court: Yes, sir.

[fol. 876] Mr. McCarthy: I would like to add the further ground that the plaintiff's proof affirmatively shows that Tazewell and New Tazewell were in the area for which TVA was the primary source of power supply on July 1, 1957.

The Court: All right, same ruling.

I will hear you gentlemen now.

Mr. McCarthy: If your Honor please, I would like first to offer into evidence a map entitled "Customers and Lines of TVA Power Distributors as of July 1, 1957 in Claiborne County, Tennessee."

The authenticity of this map has been stipulated. We will have a witness on the stand later who will explain it.

The Court: Yes, sir. All right.

(Exhibit No. 91 was filed.)

[fol. 877] Mr. McCarthy: As Exhibit 92, I would like to introduce a map entitled with a ledgend "Expansion of TV Service Area under S-931 and HR 3460." This map also has been stipulated and we will have a witness who will explain it.

(Exhibit No. 92 was marked for identification and filed.)

Mr. McCarthy: At this time I also offer an executed copy of a certified—a certified copy of the minutes of the meeting of the Board of Directors of the Tennessee Valley Authority on August 26, 1964.

Mr. Marshall: Let the record note that the Plaintiff objects to the offer of minutes of the meeting of TVA Directors as being of no probative value, no competency or relevancy in the case.

The Court: Overrule the objection without prejudice to renew the motion when all of the proof is in.

Mr. McCarthy: If the Court will bear with me, I would like to read this resolution.

The Court: Yes, sir.

Mr. McCarthy: If Your Honor has not had a chance to read it.

(Exhibit No. 93 was marked for identification and filed.)

[fol. 878] Mr. McCarthy: This is on August 26, 1964:

"Minutes of Meeting of The Board of Directors, Tennessee Valley Authority, August 26, 1964.

"A special meeting of the Board of Directors of the Tennessee Valley Authority was held in the offices of the Corporation, 508 Union Avenue, Knoxville, Tennessee, at 9:30 a.m., August 26, 1964.

"Present were A. J. Wagner, Director and Chairman; A. R. Jones, Director and Vice Chairman; Frank E. Smith, Director; L. J. Van Mol, General Manager; E. A. Shelley, Assistant General Manager; Charles J. McCarthy, General Counsel and Secretary; R. H. Marquis, Solicitor; G. O. Wessenauer, Manager of Power; Paul L. Evans, Director of Information; C. Wilson House, District Manager, and J. W. Ward, Jr., Administrative Assistant, of the Eastern District of the Division of Power Marketing; Lewis E. Wallace, Attorney; and Edgar H. Drum, an Assistant Secretary."

"Chairman Wagner presided.

"A waiver of notice of the meeting, properly executed by all of the Directors, was exhibited and ordered attached to these minutes.

"The Board approved the minutes of the meeting held July 23, 1964."

* * * * * * *

[fol. 879] "912-1. Availability of TVA Power in Claiborne County, Tennessee, Under Section 15d

"The following resolution was adopted by the Board:

"Whereas, Section 15d of the Tennessee Valley Authority Act provides in part as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary

source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area . . .

"and

"Whereas, Inquiries have been received as to the availability of TVA power in various parts of Claiborne County, Tennessee, and it appears desirable to make a finding as to the availability of TVA power under Section 15d of the Tennessee Valley Authority Act in Claiborne County and to determine precisely [fol. 880] where the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, lies with reference to Claiborne County; and

"Whereas, The information required to make such findings and determinations is now available to the Board; and

"Whereas, The Board has considered the facts set out in the memorandum of August 25, 1964, from Mr. G. O. Wessenauer, Manager of Power, to the General Manager, and the legal views expressed in the memorandum of August 25, 1964, from Mr. Charles J. McCarthy, General Counsel, to the Board of Directors, copies of which are filed with the records of the Board as Exhibits 8-26-64a and 8-26-64b, respectively, and has examined the originals of the maps attached to Mr. Wessenauer's memorandum and maps showing areas in Claiborne County claimed by Kentucky Utilities, copies of which are filed with the records of the Board as Exhibit 8-26-64c and Exhibit 8-26-64d; and

"Whereas, The Board has explored these questions fully in meetings with its Manager of Power and its General Counsel and other appropriate TVA staff, and has considered the questions in the light of such discussions, the above memoranda and maps, and the Board's own knowledge of TVA's operations and of [fol. 881] the history of Section 15d of the Tennessee Valley Authority Act;

"Now, Therefore, be it resolved, That the Board of Directors hereby finds and determines that all of Claiborne County, Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957;

"Further Resolved, That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia, and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee, is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee.

" • • •

"The meeting was adjourned at 10:45 a.m."

Now, if the Court please, the exhibits to this resolution which are part of the resolution and certified as parts of this exhibit consist, as I have read, of the memorandum from Mr. Wessenauer to Mr. Van Mol dated August 25, 1964, together with the maps that are attached thereto; a memorandum dated August [fol. 882] 25, 1964, from Charles J. McCarthy, General Counsel, to the Board of Directors, and copies of the maps which have been exhibited here in Court as showing the claim of Kentucky Utilities.

I would like to read Mr. Wessenauer's memorandum.

"Subject: Determination by the TVA Board as to Whether all (or if not all, what part) of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Well, the first paragraph simply quotes the Act Again.

"The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any

location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the entire area served by TVA power would justify the time and expense involved in making the necessary studies.

"The pendency of the litigation filed by [fol. 883] Kentucky Utilities Company in connection with service to Tazewell has given rise to inquiries as to the availability of TVA power in various parts of Claiborne County. Inquiries have come from Chambers of Commerce, individuals desiring TVA power, members of Congress; and distributors of TVA power. In connection with this litigation it has been necessary to make a detailed study of the operations of the distributors of TVA power in Claiborne County. The information necessary to determine the answers to these questions has thus been collected and it is recommended that the Board consider the various data and make the determinations necessary to permit us to answer future inquiries more specifically than we have been able to do in the past. The facts which appear to be relevant are as follows:

"TVA power is distributed in Claiborne County by the Powell Valley Electric Cooperative and the City of Lafollette electric system. The attached map—"

If the Court please, it's the same map that we have marked here earlier.

"—shows the location of the distribution lines and the customers served by these distributors as of July 1, 1957. It will be seen that the lines of TVA distributors blanket Claiborne County except for the mountainous area, between the extreme northwestern part [fol. 884] of the county served by Lafollette and Cumberland Mt. (Which is without electric service except for a few customers served by Kentucky Utilities off a line running down Mingo Hollow) and a small area near the point where Kentucky, Tennessee, and Virginia come together embracing Cumberland Gap, Harrogate, and Shawanee. Kentucky Utilities provides service to power consumers in this area and it also

provides service to most of the consumers in Tazewell and New Tazewell, to a group of consumers near Arthur, and to scattered rural consumers, most of whom are in the area immediately south of Powell River. As of July 1, 1957, Powell Valley and Lafollette supplied power to a total of 3,564 consumers in Claiborne County. On the same date Kentucky Utilities supplied power to 1,839 consumers. In June 1957 Powell Valley and Lafollette had combined kilowatthour sales of 1,025,793, as against 626,043 kilowatthours for Kentucky Utilities. The depreciated plant investment in distribution facilities of Powell Valley and Lafollette (as of January 10, 1957, for Powell Valley and as of June 30, 1957, for Lafollette) was $902,999.17 as against Kentucky Utilities, investment on June 30, 1967, of $457,947.93.

"Also attached are maps presented to the Con-
[fol. 885] gress by TVA during the hearing on the bond financing bill."

If the Court please, when Mr. Wessenauer takes the stand, he will identify and explain those maps.

"The map entitled 'Tennessee Valley Authority, Major Construction Projects, April 1955' was supplied to the Senate Committee during the 1955 hearings. The map entitled 'The TVA System, Dams and Steam Plants, January 1957" was supplied to the House Committee during the 1957 hearings. The untitled map, the original of which is colored blue, pink, and gray——"

I don't know whether Your Honor will recall or not, but during the pre-trial hearing, that was the one we referred to.

"—was supplied to the House Committee during the 1959 hearings. Each of these maps is a composite of the approximate area served by the municipal and cooperative distributors of TVA power. The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA.

"Also attached is a copy of a map——"

And this is the other map that we introduced [fol. 886] a short while ago.

"—furnished by Kentucky Utilities to the House Committee on Public Works on March 11, 1959, in connection with the bond financing legislation. So far as Claiborne County in concerned, this map differs from those supplied by TVA——"

And that is the one you had there, Your Honor, the colored map. That is the one filed by Kentucky Utilities.

"—Only in showing as outside the TVA area a small V-shaped portion of Claiborne County west of the point at which the Kentucky-Tennessee line turns north. This is the mountainous area which has no service except the Kentucky Utilities line running down Mingo Hollow. This map shows the cities of Tazewell, New Tazewell, and Cumberland Gap as within the TVA service area."

[fol. 887] Now the Board also had before them my memorandum of August 25, 1964, and I guess I should read that to have a complete story.

This is a memorandum from Charles J. McCarthy, General Counsel, to the Board of Directors, the same subject as the Wessenauer memorandum.

"I have reviewed Mr. Wessenauer's memorandum to Mr. Van Mol on the above subject and I concur in his recommendation that the TVA Board make a determination as to the portion of Claiborne County which falls within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

"The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA act is a responsibility which Congress has placed on the TVA Board. The question involved is basically a factual one to be determined in the light

of the applicable law. Mr. Wessenauer has supplied the factual material and you have asked my advice as to the law.

"The word 'area' is not defined in section 15d [fol. 888] of the TVA Act, but the use of the singular rather than the plural and the reference to the additional area extending 'around the periphery of such area,' as well as the legislative history, make clear that Congress was talking about a contiguous area and that the mere furnishing of service by a private power company to customers located within the periphery of such area does not have the effect of excluding the parts of the area which the power company serves. Congress spoke of the primary source of power supply and not of the sole source of power supply. It did not intend that a private power company could draw a circle around a group of customers or a communitl located inside the periphery of the TVA area and exclude the land within the circle from the area to which TVA is authorized to supply power. The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. A closer question is whether the periphery should be [fol. 889] drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap.

This is a matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and

can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell Counties."

And copies of the maps are attached.

Mr. Marshall: Do we have to reserve our objection to this the argument?

The Court: Yes. If you want to make an objection now, the Court will hear them.

Mr. Marshall: I think those are sort of small points, however, I thought rather than take the time of the Court now we would take it up in the argument. I [fol. 890] just don't want to be precluded from any other objection.

The Court: You are not precluded. That is one of the points in the lawsuit. At this time I don't think it is a valid point but maybe the TVA can convince me I am wrong. I don't think Congress gave this TVA the right to decide the area, no. In other words, no use to have courts if the Congress intended to give TVA that wide power. I don't believe under any circumstances—

Mr. McCarthy: We will argue that at the appropriate time.

The Court: I will be glad to hear you on that.

Mr. McCarthy: Our first witness is Mr. Wessenauer.

G. A. Wessenauer, called as a witness by and on behalf of defendant TVA, after having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. McCarthy:

Q. Will you please state your name and address?

A. G. A. Wessenauer. I live in Chattanooga, Tennessee.

Q. You are an employee of the TVA?

[fol. 891] A. Yes, sir.

Q. How long have you been with TVA?

A. Since the fall of 1935. Twenty nine years.

Q. And what position do you occupy?

A. Manager of Powell.

Q. How long have you held that position?

A. I have held the position since 1945. Prior to that I was for a number of years Acting Manager of Powell.

Q. What are the duties of your position?

A. Manager of Power is responsible for the power program of the TVA.

Q. Will you explain what this map shows, Mr. Wessenauer, Exhibit No. 91.

A. This map, as indicated by its title, shows customers and lines of TVA power distributors as of July 1, 1957 in Claiborne County, Tennessee.

Q. That is Exhibit No. 91?

A. Yes. The lines shown here indicate the distribution lines and the dots are intended to indicate the customers of these power distributors. North of the Powell branch of Norris Lake, north of Powell River, extending approximately to Highway 25 are lines and customers of the La-Follette electric system and a municipal distributor of TVA power.

A little further over in Claiborne County are the lines [fol. 892] and customers of the Powell Valley Electric Cooperative.

I think you will also note that the corporate limits of Tazewell and New Tazewell are also indicated on the map.

Q. Will you point out the relationship of Tazewell and New Tazewell to the lines of Powell Valley and the customers of Powell Valley?

A. You will note that there are lines and customers of Powell Valley completely surrounding Tazewell. Here is a line across the north with customers on it, and lines on the south, west, east, and there are also customers and lines inside the corporate limits of those two towns.

Q. I think that is all with that map.

Mr. Wessenauer, did you participate in the various congressional hearings that led up to the enactment of the 1959 bond legislation?

A. I was a witness before the committees in every one of those hearings, I believe.

Q. Would you tell the Court a little of the history of

the bond financing legislation with particular reference to the territorial limits.

A. Well, the bills as originally introduced in 1955 contained no provision relative to territorial limits. Subsequent to that and in subsequent hearings and in actions by various committees and in action of the Senate itself [fol. 893] the first territorial limitation appeared.

I believe the Congress and Senate passed a bill in 1957 designated S-1869 in which there appeared a territorial limitation. That one might be described as limiting TVA to the supply of power within any county, the entire county which they either in whole or in part were within the drainage basin of the Tennessee River or within the area served with TVA power.

There was certain exception to that of going beyond that designated area.

I should mention, your Honor, that the date of the service area was fixed as July 1, 1957.

There were exceptions which provided for the possibility of serving the United States or agencies outside of that area.

There was provision for exception providing for interconnection with other utilities such as for exchange power arrangements outside of that area; that provided for the interconnection between TVA generating plants which may have to be connected through an area outside of that area, and it also provided an exception for serving existing cooperatives as they then existed as to area as of July 1, 1957 now served by TVA.

And then it provided further that future power contracts [fol. 894] would contain provisions to vonfine the re sale to within those county boundaries and such additional area not more than five miles from such boundary as may be necessary for the growth of the community within said counties provided said communities were receiving TVA power on July 1, 1957.

[fol. 895-897] Now that bill, as I indicated, passed the Senate in the fall of '57, and that Congress completed its sessions without further action on the bill, and of course the bill died with that action, without being passed.

In the subsequent Congress, bills were introduced both in the Senate and the House, which is known in the House

as HR 3460, and that's the one it has carried throughout, so I will use that reference, was introduced in January of '59, the Congress being in session, which was in substance the same bill as passed the Senate in the previous Congress.

Hearings were held on that bill in the House and the House, in reporting the bill to the House in April of '59, changed it substantially with respect to territorial questions.

The Court: These reporters have to write this up, and I promised them we would quit as near 4:30 as possible. When you reach a stopping point where we can stop——

The Witnes: Well, sir, I'll just go back and pick up with this '59 actions if that's agreeable.

The Court: All right, adjourn Court until tomorrow morning at 9:00 o'clock.

(Whereupon, at 4:35 p.m., Court was adjourned to be reconvened, Wednesday September, 23, 1964.)

[fol. 898] Exhibits

Number	Description
94	TVA map
95	TVA map
96	TVA map
97	Photograph of Exhibit No. 96.
98	TVA memorandum, Watson to Manager's Files, 2-17-60
99	Agreement between TVA, PVEC and KU, 10-8-52
100	KU map
101	TVA, PVEC contract 9-8-45
102	Photo of Watt's testimony before Congress
103	Brooks' application for city service
104	Letter 3-10-64, KU to REA
105	PVEC map showing growth.

[fol. 899]

106	Estimate of amount of power sent outside Claiborne County
107	Chart comparing rates
108	Minutes, Board of Aldermen, New Tazewell, October 29, 1963
109	Minutes, Claiborne County Chamber of Commerce, 4-10-61
110	Minutes, Claiborne County Chamber of Commerce, May, 1961
111	Minutes, Claiborne County Chamber of Commerce, June, 1961
112	Minutes, Claiborne County Chamber of Commerce, July, 1961
113	Minutes, Claiborne County Chamber of Commerce, September, 1961
114	Minutes, Claiborne County Chamber of Commerce, March, 1962
115	Minutes, Claiborne County Chamber of Commerce, April, 1962
116	Minutes, Claiborne County Chamber of Commerce, September, 1962
117	Resolution of Tazewell, 10-21-63

[fol. 900] Third Day of Trial

Wednesday, September 23, 1964

(At 9:03 a.m., court convened pursuant to adjournment, when the following proceedings were had.)

The Court: Gentlemen, you may proceed.

GEORGE O. WESSENAUER, a witness on behalf of the defendant TVA, resumed the stand, was further examined and testified as follows:

Direct Examination (Continued)

By Mr. McCarthy:

Q. When court adjourned, Mr. Wessenauer, you were talking about a little of the background of the 1959 amendment to the TVA act. Will you proceed?

A. Yes, sir. The amendment to the TVA act which came about in 1959 was a matter of considerable importance to TVA because we had in previous years relied on earnings from the system and appropriations by the Congress to provide the power facilities, and in a number of the previous years we had not been able to get Congress to make appropriations and as a result the President had recommended to the Congress that TVA be given authority to issue revenue bonds from which to finance its capital addition to its power program, and during that time the board and principal member of the staff gave quite a bit attention to the presentation of material to the Congress on this Act.

[fol. 901] It was provided that we could be able to issue revenue bonds in the market and thereby, up to the amount of $750-million to be able to finance additions to the power system and this bonds would be in addition to any earnings of the power system which also could be utilized for that purpose and not required for any other purpose.

I was discussing yesterday the fact that the bills as were initially considered in 1955 and in 1957 did not contain any limitations with respect to territory in which TVA

power could be made available, but the bill as passed by the Senate in August, 1957 did contain limitations with respect to territory, generally providing that that area would be in any county—that could extend to the borders of any county which lie in whole or in part in the drainage basin of the Tennessee or which was in the area in which power service was being rendered on July 1, 1957.

There were provisions for extension beyond that area of a nature that could provide for inter-connections with other systems, inter-connections with TVA generating plants, and to serve existing co-ops now served by the TVA. And it provided further that future contracts for power supply to any distributor should confine the resale to within those county boundaries and such additional area not in the five miles from such boundary as may be necessary for the growth of communities within those [fol. 902] counties providing they are receiving power on July 1, 1957.

That bill was acted upon by the Senate and it was left that way when that Congress adjourned.

In the subsequent Congress bills were introduced which were substantially the same as the bill which as passed by the Senate, and those were the bills being considered among others in 1959.

In 1959 the House took the initial action and with respect to the territorial problem they rejected the provision of the bill as introduced which was similar to the Senate bill which was passed the previous session, and in place thereof included a provision that the power facilities of TVA should not be used for the sale or delivery of power outside the service area as it existed on July 1, 1957.

There were exceptions also to that contained in that bill. One of the exceptions was when it would be economically feasible for the exchange power arrangements with other power systems which did not have such arrangements on July 1, 1957, and it also indicated that the provisions of the bill was not to prevent continuing of service to Dyersburg and Covington.

I might explain that the contracts between TVA and Dyersburg and Covington were entered into subsequent to July 1, 1957 and were in effect in 1959, so this would presumably preserve the contracts with Dyersburg and

[fol. 903] Covington because of the July 1, 1957 date would have otherwise excluded them.

It also provided that it should not prevent entering into contracts with certain named cities, such as Paducah and Princeton, and so forth.

It also provided the exception that nothing would prevent the transmission of power to National Defense or the Department of Defense or any agency thereof on certification by the President that there was an emergency defense need.

Then on the floor of the House when the bill was considered there was added a provision which said that nothing should affect the present rights of parties to any existing lawsuits involving efforts of towns to obtain TVA power, and there were two such towns in Mississippi which that was intended to cover.

That is the way it passed the House on May 7, 1959.

The bill, of course, in its normal procedure was referred to the Senate and the Senate Committee had hearings and reported a bill which contained an entirely different proposal then that which was in the bill as it passed the house. And that one provided—the recommendation of the Senate Committee along these lines.

That TVA should make no contracts for the sale [fol. 904] of power except with those agencies with which TVA had contracts on July 1, 1957 which would make TVA a source of power supply for any city which owned its distribution system on July 1, 1957 having a population in excess of 10,000 or to any other city having a population in excess of 5,000 or which would in the future increase by more than two and one-half per cent or 2,000 square miles, whichever is the lesser, the area for which TVA was the primary source of power supply on July 1, 1957.

Here again there were exceptions. It provided again that additions and extensions of service authorized by this language was not to prevent continuing service to Dyersburg and Covington or from entering into contracts to certain named cities, and this was a little larger list than was in the previous action by the House, or for a Naval Auxillary air station in Mississippi, and it also had other provisions which was nothing to prevent trans-

mitting of power to the Department of Defense or its agencies, including the Atomic Energy Commission, if the President certified there was a defense need for carrying power outside the area designated by this language, and, of course, left the provision relative to the lawsuits in Mississippi.

This bill was reported to the Senate on July 2, 1959 and action was taken fairly soon thereafter by the Senate itself, and on the Senate floor the committee amendment [fol. 905] with respect to territory was replaced by an amendment presented on the floor which was to be in substitution of the committee amendment, and that is the provision which is now contained in the bill as it passed the Senate on July 9, 1959.

Now just so that there will be the continuity, this provision provides the TVA shall make no contracts for sale or delivery of power which would have the effect of making TVA or its distributors directly or indirectly a source of power supply outside the area for which TVA and its distributors were the primary source of power supply in July, 1957 and such additional areas extending not more than five miles around the periphery of such areas as may be necessary to care for the future growth of TVA and its distributors within said area.

And it had some additional provisions providing, however, that such additional area shall not increase by more than two and a half per cent or 2,000 square miles, whichever is the lesser, the area which TVA and its distributors were the primary source of power supply on July 1, 1957, and providing no part of such additional area may be in a state not now served or in a municipality receiving electric service from another source on or after July 1, 1957 and not more than 500 square miles of such additional area may be in any one state now served by TVA or its distributors.

[fol. 906] I think I have abbreviated this but I have tried to give the import.

There were further provisions, nothing shall prevent TVA or its distributors from supplying any power to any customer within the area which TVA or its distributors had served electric service on July 1, 1957 which electric service was not being supplied from any other source

on the effective date of the Act. Then they had nothing shall prevent Tennessee Valley Authority when economically feasible of making these same exchange arrangements with power systems with which it had similar arrangements on July 1, 1957 but still carrying exceptions to naming towns such as Dyersburg and Covington, and I think there was one additional one added in the course of this action. It left in the reference to the Naval Station, the supplying of power to the Atomic Energy Commission or the Department of Defense, and it continued the provision relative to the lawsuits.

Q. Now, Mr. Wessenauer, with the exception—

A. I might, just to finish this, your Honor, this bill then as passed the Senate was sent back to the House because it was different in its provisions, and the House action subsequently was on July 22, 1959 to accept the bill as it passed the Senate, so that it became on July 22, 1959 the action of both the House and the Senate and it was therefore sent to the President.

[fol. 907] Q. Mr. Wessenauer, then with the exception of the one town that you mentioned that was added on the floor of the Senate, all of these towns that are specifically named in the bill were included at a time when the bill before the Congress was a different bill and when there was no assurance as to what its final form would be; is that correct?

A. Yes. I am sure that the towns, except for Hickman, which is the last one named, were presumably the same in light of previous actions by a committee or subcommittee of one branch of the Congress.

Q. I show you a map entitled Tennessee Valley Authority, Major Construction Projects, April, 1955.

If the Court please, I have extra copies of this and some other maps, if you would like to have them.

The Court: All right.

Q. (Continuing) Would you explain what this map shows. Well, first of all, what was the purpose for which that map was made?

A. Well, the maps was used by me in testimony before the Senate Committee in 1955 for the purpose of explaining to the committee the location of principal generating

facilities of TVA, some indication of the scope of the drainage basin and of the area which was served by the municipal and co-operative distributors of TVA power.

You note the map is dated April, 1955. It shows an [fol. 908] outline of the Tennessee drainage basin and shows the river and the location of the projects, the hydro multi-purpose projects on the main river and its tributaries, and also shows the projects on the Cumberland River from which the power was being made available to the TVA system, and also identified the location of the major thermal plants in the TVA system.

The blue shading represented the area of the municipal and—the area in which the municipal and rural co-operative distributors of TVA power have made that power available to consumers at retail.

Q. And this map was prepared by TVA and submitted to the committee by you?

A. That is correct. As a matter of fact I think it appears in the hearings of the Senate Committee.

Mr. McCarthy: If the Court please, we offer this map in evidence as Exhibit No. 94.

Mr. Marshall: If the Court please, with respect to this map and the others which we anticipate TVA will offer, I would like, if I might, to get the record clear as to the purpose for which they are being offered.

Mr. Wessenauer has stated, certainly with respect to the third map in his memorandum to the Board of Directors [fol. 909] on which the Board undertook to act last month, that these maps could not be relied on to show exact service area boundaries.

He has stated in his deposition in this case that so far as service areas, at least the map standing on the board, was no more than a rough approximation.

I take it in light of those concessions by Mr. Wessenauer that these maps are not being offered as accurate represention of service area. I would like to know if that is correct.

Mr. McCarthy: That is correct. They are being offered to show the maps that the Congress had before it and the areas which Congress considered to be the service areas of the TVA

Mr. Marshall: Now on that ground I would like for

the record to note our objection. I don't think there is any suggestion any where in the legislative history that this Congress, with these rough approximations before it, undertook to legislate into law as service areas these rough approximations.

I don't know what other purpose the maps could be offered for than in support of a suggestion that having these rough approximations, these inaccurate maps before them, Congress somehow legislated these inaccuracies into law as service area.

[fol. 910] If that is the purpose we do object to the introduction for that purpose.

Mr. McCarthy: If the Court please, we do not contend that these maps show exactly the service area of each of the TVA distributors. Each of these maps that we will present is a composite of the service areas of the TVA distributors. It does not purport to show anything else.

To get an absolutely exact line you would have to make a detailed study like the board made in this case for Claiborne County, but they do show very closely the service areas of the distributors and it is clear that from the legislative history and references to these maps, the inclusion of the 2,000 miles, the two and a half per cent, which is two and a half per cent of the 8,000 square miles areas, that this is substantially what Congress had in mind. That did not mean that there might not be a place somewhere where in fact the line of TVA primary service was a little bit different than these, but this was substantially what Congress intended.

The Court: Well, the exhibit may go into the record subject to the explanation of both sides, and the Court [fol. 911] will consider it along with the other exhibits in the record.

(Exhibit No. 94 was filed.)

By Mr. McCarthy:

Q. Mr. Wessenauer, I next offer you a map entitled The TVA System, Dams and Steam Plants, January, 1957. Is that a map prepared by TVA?

A. Yes.

Q. And was that used by you at the Congressional hearings?

A. Yes, sir. This was a copy of a map which was larger map which was used at the hearing in 1957 and it shows essentially the same type of material that was given on the previous maps we discussed.

In this case instead of shaded areas showing the places where the municipalities and rural electric co-operatives that distribute TVA power, it is delineated by stiffe lines.

Mr. McCarthy: We offer this map in evidence as Exhibit No. 95.

Mr. Marshall: To avoid interrupting, may we have a continuing objection?

The Court: Yes, sir.

(Exhibit No. 95 was filed.)

By Mr. McCarthy:

Q. Now I refer you to a mounted map with a gray [fol. 912] background and blue and pink colors in the map itself and ask you if that is a map which was prepared by TVA and used at one of the hearings on the bond financing bill?

A. That is the map that was used in the 1959 hearings.

Q. Will you explain to the Court what that map shows?

A. This again was contained in the other map. In information which was contained in the other map. In this case the drainage basin of the Tennessee is shown in blue and the pink area and pink line where the pink area would overlap the blue is—the boundary of the pink area is shown by a pink line through the blue portion of the drainage basin. That pink area is intended to represent again the area in which the municipal and rural electric cooperative distributors of TVA were making power available to the ultimate consumer.

The Court: For the record, what is the number of that? What is the number of that exhibit?

Mr. McCarthy: That will be Exhibit No. 96, and I will now offer it.

(Exhibit No. 96 was filed.)

By Mr. McCarthy:

Q. Would you step up to the map, Mr. Wessenauer, [fol. 913] and point out to the Court the pink line you are referring to.

A. The pink line is indicated through here, and in here (indicating).

Q. And that is the outline of the service areas of the TVA distributors; is that correct?

A. As of '59.

Q. As of 1959?

A. Yes.

Q. All right, sir. I now show you a small map and ask you to identify that.

A. Well, that is a photographic copy of that map.

Mr. McCarthy: If the Court please, I am just offering this so there will be something convenient in size.

The Court: That is Exhibit No. 98?

Mr. McCarthy: 97.

The Court: It is the same as what other exhibit?

The Witness: Same as the preceding one.

(Exhibit No. 97 was filed.)

By Mr. McCarthy:

Q. This is a photograph of Exhibit 96; is that correct?

A. Yes, sir.

[fol. 914] Q. Now, Mr. Wessenauer, with reference to Exhibits 94, 95 and 96, will you state to the Court what part of Claiborne County is shown within the service area of TVA distributors?

A. On three of the maps all of Claiborne County is included within the area.

Q. Would you now take Exhibit No. 97 and take a pencil and draw on it the limits of the service areas of TVA distributors in the northeastern section of Tennessee there.

A. (Witness complies with request of counsel.)

Q. I would now like to show you Exhibit No. 92. When was this map presented to the Congressional Committee?

A. It was presented to the committee in 1959.

Q. Which committee and who presented it?

A. It was presented in some testimony, prepared testimony by Mr. Watts of Kentucky Utilities Company.

Q. And that was with reference to the bill that would have permitted service to all of the counties which were entirely within either TVA's service area or the watershed; is that correct?

A. Yes, sir, that is correct.

Q. Will you compare the service area of TVA as shown on this map with the service area as shown on Exhibit No. 96?

A. The areas shown here as being the present TVA [fol. 915] service area which was delineated as 1 and 2 is in most respects fairly close to the pink line and pink area as shown on the map which TVA presented.

Now there is some modification of it in the Kentucky area. For example, in the area adjacent to the Mississippi River, the line drawn in this map, the service area excludes two counties in the western end of Kentucky and and it also shows a small identation into Claiborne County between the—where the drainage basin crosses the state line—the edge of the drainage basin crosses the state line and presumably the point where the Virginia, Tennessee and Kentucky state lines come to a point.

Q. Would you point out to the Court the area in Western Kentucky which you are talking about?

A. You notice the area here where that map—this area is shown by this line in the western end of Kentucky, where the TVA exhibit shows the line following the river.

The other place was right here at this point, in Northeast Tennessee.

Q. Now referring to Exhibit 91, would you show the Court where that area in Claiborne County is?

A. If you take this map, frankly it starts at this point. If you take the—.

Q. "This point" let's identify that so the record will [fol. 916] catch it.

A. Take Exhibit 92 and take a point which starts at the junction of these states, which is this point, goes down this direction—— .

Q. That is in a southwest direction?

A. Southwest direction, and presumably comes back about where the drainage basin of the Tennessee crosses

the state line. If you study this map closely you will find that this drainage basin comes in about this point (indicating).

Q. That is an area just to the west of the area marked "Mingo Hollow"?

A. Yes. Some line goes in here from KU in Mingo Hollow and encompasses that area.

Q. While you are on this map, Mr. Wessenauer, is there considerable area in here around Mingo Hollow which does not show any service, is there any service of any kind in there?

A. I don't believe so. That is very mountainous area and this shows the extent of the lines which LaFollette had in 1957. Possibly they have gone up some further into the hollows. This is very mountainous and rough country.

Q. The memorandum to the Board refers to some KU service up Mingo Hollow. Will you identify that service?

A. This is the line extending up—it is marked on the map as Mingo Hollow.

[fol. 917] Q. Mr. Wessenauer, there has been some reference in deposition to a so-called gentlemen's agreement that was referred to by representatives of some of the power companies during the hearings on these bills. Are you familiar with the history of that so-called gentlemen's agreement?

A. Well, I don't know about gentlemen's agreement but I know how this term has been referred to and what it is referring to.

Q. Will you explain that for the Court?

A. In 1940 the TVA and distributors of power in Northern Alabama completed negotiations with the Alabama Power Company relative to the sale by the company of certain of its facilities—transmission lines and distribution facilities in Northern Alabama to the TVA and the distributors.

Following that a press release by TVA explained the transaction, and subsequently to that representatives of Alabama Power Company had referred to that as being a gentlemen's agreement, that the line in Northern Alabama between TVA and its distributors and the company

had been stabilized. It referred to that particular transaction.

Q. So far as you know, when was the first request by representatives of Tazewell for TVA power?

A. I will refer to the date February 4, 1960. The TVA Board had a visit from representatives of Middlesboro and representatives from Tazewell to discuss a number of [fol. 918] questions at that time, and there was an inquiry with respect to possibility of TVA power for Tazewell and New Tazewell.

Q. What were the Tazewell representatives told at that meeting? Well, first, were you at that meeting?

A. Yes, I was there.

Q. What were the Tazewell representatives told as to whether TVA could legally supply power to Tazewell and New Tazewell?

Mr. Marshall: I object to that. It seems to me to be pure self-serving statements by people who were not present at all. I don't see how it is competent.

Mr. McCarthy: If the Court please, the plaintiff here has put in some documents purporting to show that TVA was not sure it could serve Tazewell at a date later than this meeting. Apparently as casting some doubt on TVA's right to serve.

It seems to me it is important to establish that the very first time the question came up they were told in the presence of the TVA Board that there was no legal inhibitions against furnishing to Tazewell and New Tazewell.

The Court: Ordinarily that would be hearsay testimony since the KU was not present and in the nature of self-[fol. 919] serving testimony since the KU was not present.

Now what exception to the rules would this evidence come under, on the theory that he has opened up the subject and that you have a right to explore it? What is the basis of the contention that it goes in?

Mr. McCarthy: I think that that is one reason, but I think that it is also admissible simply as showing a consistent course of action by the TVA Board, showing the view that the agency charged with administration of this statute took the first time the question was presented to it. I think that is very important.

The Court: Well, now does it go in the record as sub-

stantive evidence to prove that fact or does it go in for the limited purpose to show the pattern followed by the TVA and that the pattern was a consistent one?

Mr. McCarthy: Well, I think basically it goes in to show the pattern, but I think the fact that Tazewell was told that they could be served in part of the pattern.

The Court: Well, the Court will let it go into the record for whatever bearing it may have on the question of the [fol. 920] consistency or inconsistency of the TVA, of the pattern of TVA, the pattern that was followed by the TVA in this matter.

By Mr. McCarthy:

Q. Will you answer the question, Mr. Wessenauer?

A. The answer was given to Tazewell that it would be legal for us to supply Tazewell and New Tazewell as they were well within the area served by TVA on July 1, 1957.

Q. Was there any other advice to Tazewell as to feasibility?

A. Well, it was indicated that because of the size of Tazewell and New Tazewell that a question of feasibility need to be looked into, and it was suggested that they might explore the possibility of being served by a larger entity.

Q. Was a memorandum prepared giving what was said and done at that meeting?

A. Yes, sir, there was.

Q. Was that memorandum prepared in the regular course of business?

A. Yes, sir, it was.

Q. And was it the regular course of business in preparing such memorandum?

A. Yes.

Q. I show you here a document from James S. Watson, Director of Power Marketing, Chattanooga, to Manager's [fol. 921] Files, Chattanooga, dated February 17, 1960, subject, Middlesboro-Tazewell, and ask you if you can identify that document?

A. Yes, sir. That is a copy of the—this is a memorandum reporting that meeting.

Q. Who is it signed by?

A. Signed by James S. Watson.
Q. Signed initials or his full name?
A. He signed his initials.
Q. Do you recognize those initials?
A. Oh, yes. I have seen them many times.

Mr. McCarthy: If the Court please, we would like to offer at this time as Exhibit No. 98 a copy of the memorandum which Mr. Wessenauer has just identified.

Mr. Marshall: May we see it before it goes in?

The Court: Yes, sir.

Mr. McCarthy: You had it a long time (handing paper to counsel.) This is one of the documents that we supplied to KU in response to interrogatories.

Mr. Marshall: For some reason I never saw this particular one in a wealth of others.

Same objection.

The Court: Same ruling.

[fol. 922] (Exhibit No. 98 was filed.)

The Court: Mr. McCarthy, if there is anything in any of these exhibits you expect the Court to know about, I wish you would, while you are on them, just—I don't ask you to read them but if there is anything I should know I would like to know it now so I will not have to go through and pick out the ones that you feel are pertinent.

Mr. McCarthy: All right. Your Honor, I don't think it is necessary to read this into the record. I think Mr. Wessenauer has testified as to the substance of the matters that we are interested in there.

The Court: All right.

By Mr. McCarthy:

Q. Mr. Wessenauer, does this memorandum conform to your recollection of what transpired at that meeting?

A. Yes, it does.

Q. What is the population of the area served by TVA power?

A. It is between four and a half and five million people.

Q. Now referring back to those three maps again, Mr. Wessenauer, I am not sure that this was adequately

covered. What is the relationship in your view of the service areas as shown on those maps to the area for [fol. 923] which TVA was the primary source of power supply as included in the bill, in the Act?

A. I would say it is substantially that but I think it does not cover other areas. In other words, for example, Calvert City, Kentucky, TVA was supplying power directly in that area and that is not delineated on the map because this was showing only the area served by the municipal and co-operative distributors of TVA power.

Q. I show you at this time an agreement among the Tennessee Valley Authority, Powell Valley Electric Co-operative, and Kentucky Utilities Company, and ask you if you can identify that document?

A. Yes, sir. This is a document that was entered into on October 8, 1952 among TVA, Powell Valley Electric Co-operative and Kentucky Utilities Company relative to the facilities that we provided and the exchange of power over those facilities.

Q. That is the so-called tri-party agreement?

A. I believe it has been referred to quite frequently as the tri-partite agreement.

Mr. McCarthy: We offer it in evidence as Exhibit No. 99.

(Exhibit No. 99 was filed.)

By Mr. McCarthy:

Q. Would you explain to the Court briefly what that [fol. 924] agreement covers and with a little of the background?

A. I would like to precede that by explaining that TVA and Kentucky Utilities Company had entered into a contract dated March 22, 1951 which provided for a number of things between the Company and TVA.

It provided, for example exchange of economy energy that might be supplied by the one system to the other, or it provided for emergency service in case of a breakdown of facilities by either party and the other would come to its assistance.

It also provided for the exchange of power. There were some places where it was found to be more economical,

more convenient to use the facilities of the other party to serve customers, its customers.

For example, where a line of Kentucky Utilities was closer to one of TVA's distributors where it would like to have a point of delivery of power, an arrangement was made whereby a sub-station would be built and the power would be made available to that point by KU and be returned to KU at another point. It also worked in reverse where KU could use some of TVA's facilities in its system to carry power to some points on its system where it would be desirable to have it.

This is the background of the contract between TVA and KU.

[fol. 925] This contract of October, 1952 provided for the possibility of a similiar transaction. In this case the Powell Valley, in connection with its need for power in the Tazewell area, was very desirous of getting a delivery of power at that point by TVA. Heretofore it had to get it from another point quite some distance away and carry it over its own lines into this general area.

This contemplated that, and because of that desire, we sought to find a way to get power there and one of the possibilities was to see whether we could work out an arrangement with KU, and discussions were held with KU and the outcome of it was this agreement.

It contemplated that KU would extend—build a line of 69KV extending from Kentucky down to the Tazewell area. Now since the co-op uses power of lower voltage a sub-station was necessary at that point, and the contract provided that Powell Valley would build a 5,000 KVA substation at Tazewell and that part of the capacity would be utilized and reserved for the use of the company so that the power could come down its line through the Powell Valley substation and be delivered to the company's distribution lines in that area.

It also contemplated this power would be delivered down on the company's lines through the sub-station as TVA power which would be delivered to Powell Valley [fol. 926] for distribution over its lines. The power supplied over its lines for Powell Valley would be returned by TVA to the company at other points on inter-connection and

reference is made in the contract to the earlier instrument which generally provided for those types of transactions.

Q. Is there any provision in that agreement about division of territory or who served who?

A. No, sir.

Q. Has TVA entered into any agreement with Kentucky Utilities along either of these lines?

A. No, sir.

Q. Has TVA entered into an agreement with any utility as to service?

A. No, sir, have not.

Q. The plaintiffs have put in the record as Exhibit No. 77 a memorandum dealing with a meeting which the TVA Board held on November 27, 1962. Did you attend that meeting?

A. Yes, sir.

Q. What was the occasion for that meeting?

A. Well, the principal occasion for the meeting was the fact that the Powell Valley Co-operative wanted to have an assurance from TVA that irrespective of what might happen that it would continue to make power available to Powell Valley at Tazewell in accordance with the [fol. 927] contract signed with the Powell Valley for a delivery point at that location.

You understand that we had been supplying power to them at that point over the facilities of Kentucky Utilities Company under the terms of this tri-party agreement.

If for some reason that agreement should be terminated, the co-operative wanted—by the company or TVA or Powell Valley, the co-op wanted further assurance from TVA that we would continue to supply their needs in that area, while the alternative was either to make other arrangements with KU or to build their own facility, and that matter was discussed with the Board and the Board decided, according to our recommendation, that we would assure Powell Valley that we would continue to make power available at that point as we had contracted to do.

[fol. 928] Q. Was Powell Valley seeking assurance of power to serve the cities of Tazewell and New Tazewell or simply to serve its own loads in the Tazewell area?

A. They wanted assurance to serve the loads in that

area because they had an extensive number of lines in and about the Tazewell area and the quantities of power they were taking was their major concern.

Q. Did they express concern that KU might consider the tri-party agreement violated or concerned it might be terminated by its terms?

A. I don't know what was in their mind about it. It could have been either one of those. I think it would have been, well, that since they had terminated the 1958 letter agreement between them that possibly the Company might feel that they would not want to continue the tri-party agreement and they could have cancelled it under its terms.

Q. You wrote a memorandum to the Board which is made an exhibit to the Board minutes which have been introduced here as Exhibit No. 93?

A. Yes, sir.

Q. Do you adopt the statements made in that memorandum as your sworn testimony in this case?

A. Yes, sir.

Q. Have you received any instructions from the [fol. 929] TVA Board as to the attitude that you should take with reference to requests for electric service?

A. Well, I think the basis under which we have worked through the years is in conformance with the Board's view—to make clear to start with—that TVA does not solicit or initiate any request for service from outsiders. That is, from agencies not already receiving service.

However, when a request is made to TVA for power the policy has been to assist that party in an understanding of all of the steps that are necessary in order to finally obtain TVA power.

I think I ought to explain that one of the purposes of the TVA Act as expressed in the Act, that the power being produced at these projects, public projects, is to be made available to the people in the region within the area in which it has authority to make such power available.

The Act indicates that it should be made available widely at low cost and encourage the economic growth and development of the people in the region.

So when a community or group of citizens, rural, urban, of what have you, come in and indicate that they would like to get TVA power generally, that is, they under-

stand the purpose of what it is they want but they are inexperienced with many of the technical, engineering, [fol. 930] operating, financing, marketing, legal, other aspects of bringing that about, and so our staff has in varying degree responded to those requests for assistance by explaining to the people involved, things that are involved in order that they might reach the conclusion which they are seeking to reach.

Mr. McCarthy: No further questions.

Cross-examination.

By Mr. Rowntree:

Q. May it please the Court, Mr. Wessenauer, this map, Exhibit No. 96, the big map, that was presented to the Congress by you in the March session of the House committee, 1959?

A. That is correct.

Q. And it is true, is it not, that at that time the House bill, the bill being considered by the House involved the allowing TVA to go to the boundaries of all counties wherein it served any power at all, in 1957?

A. Yes, plus any county in which the drainage basin was a part of.

Q. Yes, and there was no particular point, was there, in splitting up counties or showing up extensions of investor owned utilities down into the counties where TVA was serving?

A. We were not showing the provision of the bill. [fol. 931] We were attempting to show here the area served by the municipal and cooperative distributors.

Q. But this was a rough approximation as you have testified, is that right?

A. According to the map it is an approximation.

Q. It was not necessary to go into details about the boundary lines of counties to show breaks in the service area inside the particular counties, was there?

A. I don't believe that came up in the discussion.

Q. The same is true with respect to this map presented to the Congress by Kentucky Utilities which you have introduced here, Exhibit No. 92; that map was presented

with respect to the same bill, was it not? That was—that is the same bill that this larger map of TVA was presented on?

A. Yes, it was presented with the effort to reduce the area to the area of TVA service area.

Q. And that map you have in your hand, the KU map that was presented to the Congress, was presented the very next day after your map, is that right?

A. Rather close. I don't remember the exact day.

Q. Now as I understand you have introduced the Kentucky Utilities map, Exhibit 92, to show what Congress had in its mind to be the service area as of 1957 or as of [fol. 932] the time Congress was acting on it, or what?

A. This map was prepared to show the area as we thought it to be in 1959.

The Court: You refer to Exhibit No. 96?

The Witness: I am sorry, your Honor. Exhibit No. 96, yes, sir.

Q. Now why did you present that Exhibit No. 92, the Kentucky Utilities presentation, to your Board, what was your purpose in doing that?

A. I think it served to throw light on the information which was before the Congress during the hearing in which it arrived at the language that finally was put in the TVA Act. I think it is important, Mr. Rowntree, because you will notice that Kentucky Utilities Company apparently made some modifications of the map as TVA presented it, and it was at a time when the House committee finally adopted a provision when it reported the bill out which restricted the area to the area being served by the TVA power. So I think it must have been very pertinent at the time, both this map and that map.

Q. At that time they were considering the county-wide areas as we just talked about before, that is when you all got these maps up?

A. That was the bill that was presented, evidence was presented by others to restrict the area to the [fol. 933] service area of the distributors and TVA, and presumably this map was in connection with that testimony.

Q. Going back to my question, Mr. Wessenauer, at the time these maps were prepared and presented to Congress,

the area provision of the bill was talking about county-wide area, is that not right?

A. The bill that was introduced had county-wide area; yes, sir.

Q. And does that map of Kentucky Utilities, Exhibit No. 92, say the area of TVA is defined under the bill then existing and by yourself?

A. No. It says present TVA service area, the area of Tennessee River drainage basin lying within the present TVA service area.

Q. Read the caption at the top of the map.

A. "Expansion of TVA service area under S-931 and HR-3460."

The Court: Is that Exhibit 92 or 93?

The Witness: This one is marked 92.

The Court: Ninety-two, all right.

By Mr. Rowntree:

Q. Were those words contained in the caption of the bills being considered?

A. HR-3460 was the one before the House; yes, sir.

Q. Now if you were showing what Congress had in [fol. 934] its mind at that time with respect to what the service area was, why did you not present to the Board the other map that Kentucky Utilities presented to Congress at that time?

A. I don't recall the other map that was presented to Congress at the time.

Q. I believe you have referred to the fact that this was presented to Congress on the March hearings in the House?

A. Yes, sir.

Q. Is it true that you did not do any research into what Congress had before it before you went to the Board of the TVA to give your expert testimony as to what Congress did consider?

A. I thought I did a complete research; yes, sir.

Q. And you did enough research to find this KU map that is exhibited here as Exhibit No. 92?

A. That's right.

Q. And yet you did not observe another map introduced simultaneously with it by KU?

A. It is my recollection that other map dealt with the TVA service in the western part of the state.

Q. Are you saying that at the time you made your statement to the TVA Board upon which the Board acted you did not even know about the other map that KU introduced at the same time as Exhibit No. 92?

[fol. 935] A. I recall there were other maps introduced which dealt with showing TVA service—by KU showing TVA service in Kentucky.

Q. I will show you a statement of Mr. Watt of KU presented to the House committee in March, 1959 at the time that Exhibit No. 92 was presented to the House and show you the map colored in red and blue. Is that not the map which has been introduced here as Exhibit No. 92?

A. Yes, it seems to be the same map.

Q. Now you observe that map showing the Kentucky Utilities area of service.

Have you ever seen that map before?

A. I may have. I don't recall it. You see, there are colors here designating TVA area, that was what I was talking about.

Q. Did you check with your lawyers before you gave your statement to the TVA Board to determine what other maps had been presented to Congress by KU?

A. I sought to find out all that I could, sir; yes, sir.

Q. Were you advised that we had designated this map here in pre-trial discovery proceedings in this case, were you advised of that?

A. No, sir.

The Court: Is this an exhibit, Mr. Rowntree?

[fol. 936] Mr. Rowntree: Not yet, your Honor. We will make it one.

Now I would like to introduce——

The Witness: I believe that this map shows only the transmission lines. It doesn't show service area.

By Mr. Rowntree:

Q. Now I am reading from the House committee report, and this same statement will be found there in Mr. Watt's testimony, and this is on page 230 of the House March 10 and 11 hearings, 1959.

The Court: I don't have the House. I have the Senate. Do you have a copy of it?

Mr. Marshall: No, sir, we don't have another copy. It is the same testimony as in this typewritten thing. You could follow it there.

Mr. Rowntree: I have got this marked.

The Court: Is this the one?

Mr. Rowntree: No, sir, not in that book.

This is Mr. Watt's report to the House committee that was considering this bill, and I am reading from page 230 of the published hearings before the Committee on Public Works, House of Representatives, 86th Congress, March 10 and 11, 1959.

[fol. 937] "The expanded area covered by this bill includes three counties"—well, up before that, your Honor, in paragraph No. 1 before that page.

"Two maps are attached as a part of this information. They are: (a) A map showing the territory served by the company in Kentucky, Virginia, and Tennessee; (b) a map showing the expansion of TVA service area under H.R. 3460."

That was the bill about the county-wide area.

Now under that paragraph 1 on the next page, right in the middle of it, it refers to one county in Tennessee in which the company renders service and that can only refer, I believe, to Claiborne County.

We would like to introduce, your Honor, a copy of that map. We will introduce the copy of that map as Exhibit 100.

(Exhibit No. 100 was filed.)

Mr. Rowntree: If your Honor please, I think I had better read the whole paragraph just to clarify the comment made by the witness in the last answer. This is on that paragraph I referred to just a while ago which mentioned a county in Tennessee.

"The expanded area covered by this bill includes three counties in the western part of Kentucky, shown on the [fol. 938] map in red, in which the company adequately serves the customers as well as the rural cooperatives. There are some 900 square miles of territory and 19,000

customers in this area. The territory shown in red at the righthand side of the map covers three counties in western Virginia in which the subsidiary, Old Dominion Power Co., renders service, and one county in Tennessee in which the company renders service, all of which counties lie in the Tennessee River drainage basin. The provision of the bill would permit expansion of TVA service in those counties, thus affecting an area of some 1,300 square miles in which 16,000 customers are served by the company and its subsidiary. The two areas shown in red cover a total, therefore, of 2,200 square miles in which an aggregate of 35,000 customers are served by the company and its subsidiary."

By Mr. Rowntree:

Q. Now, Mr. Wessenauer, after that map was introduced to Congress showing this amount of service rendered by Kentucky Utilities in Claiborne County, was the bill amended to eliminate the possibility of TVA extending its service throughout the county in which it was rendering service?

A. The bill was amended—the provision of the bill was, [fol. 939] context was changed to one which limited it to the service area of distributors.

Q. And that is the law right now, is it not?

A. No, that is not the law right now. That provision was changed after that.

Q. I mean with respect to that particular point, that is the law.

A. Well, there is—no, I wouldn't say. There are a lot of other exceptions to that, Mr. Rowntree.

Q. Do they pertain to county boundaries?

A. They are not specifically related to county boundaries, if that is your question.

Q. This August 24 Board meeting of TVA, TVA Board, that was not quite a month ago, was it?

A. Just about a month; yes, sir.

Q. And it came a short time after your deposition in this case, did it not?

A. Came after my deposition; yes, sir.

The Court: Read those last questions and answers.

(The last two questions and answers were read by the reporter.)

The Court: You mean that after the lawsuit was filed the Board convened and made these findings, is that what you are saying, Mr. Wessenauer?

The Witness: The Board made the findings on [fol. 940] August 24 of this year, your Honor.

The Court: That was how long after the suit was filed?

Mr. Marshall: Suit was filed November 7, 1963.

Mr. Rowntree: If your Honor please, we had completed discovery about two weeks before that Board meeting.

Mr. Marshall: I believe the date of the Board meeting was August 26, to keep the record straight; is that right? August 26, 1964.

By Mr. Rowntree:

Q. Had TVA taken any steps to defining its service area before that Board meeting of August 26, 1964?

A. Only in an approximate way. That is, TVA had attempted to develop an approximate line of the area.

Q. Did you not testify in your deposition two weeks before that meeting that no line had been drawn?

A. I think I said no exact line had been drawn; that is right.

Q. That point covered quite a bit of pages in your deposition, didn't it?

A. It wasn't just one sentence.

Q. And is it not true that as time passes by it becomes [fol. 941] progressively more difficult to draw a line of this service area of TVA?

A. It has to rely on the facts as they existed on July 1, 1957.

Q. That is right. And customers change and there is considerable growth going on in various parts of the country, part of your area. Now if TVA has the obligation and the responsibility of fixing this boundary line around its area, why hasn't it done something long before this?

A. I think it hasn't found it necessary to draw it prior to this time in any part of the area. It hasn't undertaken the expense of gathering information to do so.

Q. Well, these problems arise, might arise in the future

certainly and certainly the TVA Board must have known that some problems would arise about this territorial limit, didn't it, after all the fussing in Congress about it?

A. Well, I think it hoped that there wouldn't be any.

Q. And this problem did arise in Claiborne County?

A. Yes, sir.

Q. And the problem will arise somewhere else sometime too, won't it?

A. It may.

Q. And yet the Board has not taken any action [fol. 942] until August 26, 1964 to make a specific line to fix its boundary under the TVA act?

A. That is the first action to determine a specific point in one portion of the area.

Q. And is it not true that the circumstances of individual situations will cover the fixing of that line under the language of the Act?

A. Circumstances at each location would have a bearing on the question.

Q. Mr. Wessenauer, I want to go into some phases of the contract relationship between Powell Valley and TVA. Do you have a copy of the TVA contract with Powell Valley with you?

A. No, I do not.

Q. I show you a copy of the contract dated the 8th day of September, 1945 between TVA and Powell Valley Electric Cooperative taken from pages 181 through 193 of the TVA Annual Report for 1946.

Mr. Rowntree: I would like to file that as Exhibit No. 101.

(Exhibit No. 101 was filed.)

By Mr. Rowntree:

Q. Now, Mr. Wessenauer, the contracts, including the Powell Valley contract, does include provisions which require the distributors such as Powell Valley to abide by [fol. 943] by TVA Act, is that not true?

A. Yes, sir, it says that the contract is subject to the provisions of the TVA Act.

Q. And does that not, under the considerations of the Board and in their interpretations, include the requirement

that these distributors abide by the 1959 amendment under these existing contracts?

A. I think that is a legal question I don't know the answer to.

Q. Have you not already answered it, and I refer to page 149 of your deposition:

Question: "Do you wait until some dispute has arisen before a line is undertaken to be drawn by TVA of its boundary?"

Answer: "Well, we haven't had a reason to draw a line, precise line."

Question: "Does TVA correlate or coordinate with the distributor the question of where this line is to be drawn?"

Answer: "Our contracts with the distributors contains a provision which reminds them of the limitations of the law so that they are, under the contract, to observe the provisions of the TVA Act."

Question: "Does TVA leave it up to each distributor to draw its own line?"

[fol. 944] Answer: "We leave it up to the distributor to determine that they are staying within the law."

A. I think I might answer that, Mr. Rowntree, by saying that in all the contracts we have entered into subsequent to the passage of the 1959 amendment, we have a provision specifically calling that to the contractor's attention. The Powell Valley contract was entered into prior to that date and therefore it does not contain that provision.

Q. It did contain a provision——

A. My answer previously raised the question as to the timing of this contract in relation to the amendment, and as I say, I don't have the legal answer to that phase of it.

Q. That is the way you have always treated it however, is that not true, with respect to all of your distributors? I was asking about all of your distributors.

A. I may have misunderstood your question at the time, Mr. Rowntree.

Q. You do want them to abide by the law, I take it?

A. Certainly.

Q. Can you tell us what Tazewell and New Tazewell come under with respect to your rate schedule or in the contract?

A. Tazewell and New Tazewell?

Q. Yes, sir.

[fol. 945] A. As what?

Q. I beg your pardon?

A. I don't understand your question.

Q. Can you tell us what rate schedule Tazewell and New Tazewell come under under your rate schedule?

A. They are served by the cooperative. They would come under rate schedule BG.

Q. Is that the charge that is made to the town for the service by the cooperative?

A. I assume so.

Q. It is not the charge made to the individual customer?

A. By the town; no, sir.

Q. Well, of course, your rate schedule covers the charge made by Powell Valley, that is what your contract fixes, the charge to be made by Powell Valley, is that not true?

A. That is right.

Q. And so the charge that is contained in the rate schedule would be the charge that it charges its customer.

A. That is right.

Q. Which would be Tazewell and New Tazewell power system.

A. That is right.

[fol. 946] So does Powell Valley charge the BG rate to Tazewell and New Tazewell?

A. I assume so.

Q. Do you know what charge is made to the customers of New Tazewell and Tazewell systems?

A. No, sir, I don't.

Q. Have you checked to find out?

A. No, I haven't.

Q. Isn't it true that the rate provision of this contract with distributors are of the essence of the contract?

A. They are. Their rates charged to their customers is important; yes, sir.

Q. And TVA abides by its rates and informs its distributors to abide by its rates including municipal and cooperative distributors; is that not true?

A. Well, the rates of each contract with each municipality and each cooperative distributor would be as contained in the contract.

Q. Is that BG rate a wholesale rate that the Powell Valley charges its customers for resale by that customer to somebody else?

A. No, the rate is for non-residential, essentially. It is an average of all the customers except for those coming— [fol. 947] average under the residential or street lighting schedule.

Q. That is for consumption. That is a consumption charge.

A. That is.

The Court: Mr. Rowntree, what is the point?

Mr. Rowntree: If your Honor please, we are trying to see if there is a Tazewell and New Tazewell power board or power system. We don't think there can be under this rate schedule and contract between TVA and Powell Valley. We are completely at a loss to know how it can fit into these schedules that are attached to that contract.

Mr. Marshall: May I make a further answer to that?

The Court: Yes, sir.

Mr. Marshall: The TVA has said in its brief that it has not made a contract with Powell Valley since the 1959 Act became effective, that it is therefore selling under an old contract that was effective prior to the time that Act became effective, so that under that old contract it can supply for resale anywhere it wants to without regard to the territorial limitation.

We don't think the basic point is sound but the September [fol. 948] 8, 1945 contract between TVA and Powell Valley contains an express provision that the power bought by Powell Valley cannot be sold to a customer for resale, therefore Powell Valley has already testified in the case that its customer here is not the ultimate consumer—its customer is the municipal system, Tazewell municipal system and New Tazewell municipal system, and that its customer in turn, the municipal systems, sell to the individuals.

Our legal point is that that cannot be done under the 1945 contract, therefore, there must be a later at least verbal contract if Powell Valley is with TVA permission selling to the municipal systems for resale.

The Court: All right.

By Mr. Rowntree:

Q. Now, Mr. Wessenauer, will you turn to paragraph 19 of the schedule of terms and conditions of the contract, the paragraph called sub-metering.

"Cooperative shall not sell electricity for sub-metering or further resale."

So here we have a sub-station where Powell Valley is selling for resale and sub-metering. How do they accomplish that under this provision of the contract?

A. They wouldn't under that provision of the contract.

[fol. 949] Q. Has TVA done anything about that?

A. No, sir.

Q. Do you permit other cooperatives to get out from under the terms of the contract?

A. There are some cases where it is waived.

Q. Is it not true you have to come to some specific agreement upon that?

A. Not always.

Q. When did you waive that provision?

A. Waived it by taking no action.

Q. I read the paragraph 9 of contract terms and conditions:

"Attached hereto and hereby made a part hereof is a schedule of terms and conditions. The provisions of this schedule may from time to time be changed or supplemented by written agreement of the cooperative and Authority. It is understood and agreed that the several provisions of the said schedule with such changes as might from time to time be adopted pursuant thereto, as well as the other provisions of this contract and all schedules of rates and charges are of the essence of the contract."

Now you say that you just waive those provisions from time to time by failure to do anything about it?

A. There may be some instances; yes, sir.

[fol. 950] Q. Have you waived the provision about the rates charged Bristol, Tennessee, for instance?

A. No, sir.

Q. And there has been a very serious dispute going on about that for a long time.

A. It has been settled.

Q. And is it not true that these provisions are of the essence of the contract, or do you deny that?

A. They are of the essence in varying degree; yes, sir.

Q. Have you considered the fact specifically that Powell Valley was selling for resale to Tazewell and New Tazewell in turn to be resold by Tazewell and New Tazewell to customers?

A. I don't understand the question.

Q. Have you considered this specific violation of the contract? I mean, have you taken it up and considered it, has it been called to your attention?

A. I am aware of it; yes, sir.

Q. Has there been any discussion between the TVA and Powell Valley about that, in your presence?

A. Not in my presence.

The Court: I have lost connection. What provision is that of the contract?

[fol. 951] Mr. Rowntree: There is a provision in the contract——

The Court: Read that again.

Mr. Rowntree: All right.

"Cooperative"—Powell Valley—"shall not sell electricity for sub-metering or further resale."

By Mr. Rowntree:

Q. Now, Mr. Wessenauer, you introduced this exhibit about the February 17, 1960 meeting with the people from Middlesboro and Tazewell?

A. Yes, sir.

Q. Do you recall that the mayor of Middlesboro and three other citizens of Middlesboro came in and along with them came Mr. Lawrence Russell of Tazewell?

A. Yes, sir.

Q. Was Mr. Lawrence Russell the mayor of Tazewell?

A. I do not know.

Q. Well, did he have a position on the city council?

A. I don't know.

Q. Was he a representative of the Chamber of Commerce?

A. I don't know.

Q. Apparently tagging along with the Middlesboro citi-

zens, and is it not true that the main purpose of that meeting was to consider Middlesboro?

[fol. 952] A. I don't believe so, Mr. Rowntree.

Q. Well, it might become necessary to read this memorandum but do you deny that the greater part of the memorandum discusses Middlesboro?

A. No, sir, but I think that one of the major interests was the location of a TVA steam plant and therefore it encompassed more than just Middlesboro.

Q. Where was the location supposed to be?

A. They were urging a location up in eastern Kentucky, or a location that would use coal from this area.

Q. And was there two paragraphs here that talk about Middlesboro power situation, supplying of power to Middlesboro?

A. That is correct.

Q. And one sentence down here, two sentences about Tazewell; is that right?

A. That is correct.

Q. And Mr. Russell was there with these apparently as a private citizen, wasn't he?

A. I assume he is a citizen of Tazewell.

Q. Asked about Tazewell and TVA made a comment here that they could supply Tazewell under the Act.

A. We were explaining to Middlesboro why TVA could not serve the municipality of Middlesboro and Mr. Russell asked about Tazewell.

[fol. 953] Q. Yes, sir, that is all that happened; is that not right?

A. That is correct.

Q. And it was the following year before an official delegation came down from Tazewell and New Tazewell, isn't that right?

A. It was quite sometime later.

Q. And you weren't present at that meeting, were you?

A. No, sir.

Q. And I believe we have an exhibit in the file giving his memorandum on that.

Now, Mr. Wessenauer, you stated that TVA does everything it can or is necessary to help people get TVA power when they request it. Is that the substance of your testimony?

A. No, I would not put it that way. We would attempt to give, as requested, the benefit of advice on various aspects of the various steps that are required in a community or cooperative undertaking to buy power from the TVA and distribute it.

Q. Do you turn these requests over to your staff, your subordinates to handle?

A. Well, our local staff and district staff generally is acquainted with the procedures and rules.

[fol. 954] Q. To take these steps that are appropriate and necessary, is that right?

A. That is right.

[fol. 955] Q. To take these steps that are appropriate and necessary, is that right?

A. That's right.

Q. And they have authority to act and do take these steps?

A. They have authority to give advice, that's right.

Q. After reviewing these memoranda of TVA, do you consider that all of these steps taken by these representatives of TVA were appropriate and necessary in accordance with TVA's policy?

A. I believe that in every case that the TVA staff was sincerely trying to put before the people of the region the various aspects of this as fully as they could so they would have the benefit of all of our knowledge in reaching their decisions.

Q. Therefore, those have your approval, those steps taken pursuant to these meetings and so forth?

A. The rendering of advice has my approval, yes, sir.

Q. Going back to that red Kentucky Utility map presented to Congress, I just want to briefly——

A. This one?

Q. No, the other one.

A. I don't believe I have it here, sir.

[fol. 956] Mr. Rowntree: Here it is.

I want to read into the record, Your Honor, the answer I gave to interrogatory number 21 addressed to us by TVA. The interrogatory is:

"List and describe all maps which were furnished by you to any Committee of Congress, or any member

of Congress, in connection with the hearings which were held with respect to any of the bills leading up to the 1959 amendment to the TVA Act, and as to each give the name of the Committee, or member of Congress, to whom it was supplied, the date it was supplied, and the name and address of the custodian, or in the alternative, attach a copy of the map to your answer."

We designated three maps. The first map was the one, map 100, Exhibit 100, which we designated map 1.

"A map of 'Kentucky Utilities Company and Subsidiary Territory Served,' stated to show (a) counties lying in whole or part in the Tennessee River drainage basin, (b) KU territories in which rural cooperatives distributed TVA power and (c) other areas in which TVA power was used."

Another paragraph of that same answer was that maps 1 and 2, 2 being Exhibit 92——

[fol. 957] "Maps I and II were supplied on March 11, 1959, to the House Committee on Public Works."

That's all.

The Court: Now, Mr. Wessenauer, on the last map, it only shows distribution, it doesn't show the area.

Mr. Rowntree: That's why we read what Mr. Watt told Congress into the record, that's part of the House Committee report.

The Court: His testimony did advise Congress as to the territory served by KU?

Mr. Rowntree: That's right, and he talked about one county in Tennessee served by KU shown in red on the map. He explained to Congress completely what the map was showing, the area in Campbell—Claiborne County as defined in red. It can be the only county that he was talking about as being served by KU on that map. I'm sure that Congress understood what the red was from the report that Mr. Watt read to the Committee. He covered it completely with his statement there. It shows clearly what the red means on that map.

Mr. McCarthy: If the Court please, this is not the time

to argue, I know, but I would like to comment on the state-
[fol. 958] ments that have been made about this map. This map was introduced at the same time as the other map. This was introduced at the same time as Exhibit 92. Exhibit 92 shows the TVA service area. It shows all of Claiborne County as part of the TVA service area except for that little area in Mingo Hollow. This map shows the parts of the TVA service area in which KU power is also available, and that's all it shows. It's drawn in relation to that other map, in relation to what that map was supposed to show, the area that TVA would have under the existing bill, the area within—the counties within the drainage basin or areas in which TVA power was then available, so I don't feel that this map detracts one whit from the fact that Kentucky Utilities represented to Congress that Claiborne County was within the TVA service area. Congress took KU at its word and gave TVA authority to serve it.

Now I have just another question.

Mr. Marshall: Just a moment, I would like to respond to that.

You cannot place that interpretation on the facts. Number one, the Exhibit 92 map is a small-scale map, not prepared by Kentucky Utilities Company. It says right on the map that it is an NAEC, National Association of Electric
[fol. 959] Companies, map, which Mr. Watt filed to illustrate a point, the point being that if this bill, as it then stood, were enacted, there would be some twenty-five thousand additional square miles that TVA could take. It was not put in to show here as a defined service area, because that at that time was not the bill before Congress.

Second, this map which we did not prepare didn't adequately show Claiborne County, so Mr. Watt took KU transmission system map and the KU people went to the trouble of hand coloring in red Claiborne County, and then Mr. Watt testified that if the bill were enacted, this county, Claiborne County, in which we had service, would be a county in which TVA could expand under the then pending bill and take the whole county and push us out.

After that objection by KU, that provision in the bill was dropped. The one that would permit the TVA to take any county in which it had most of the service or some service was dropped, so you can't conclude from that set

of facts that Congress meant to give TVA Claiborne County. You have to conclude just the reverse, that Congress did not mean to give TVA the right to go to county boundaries wherever it had service. It meant to protect the service areas of utilities in such counties as it did by [fol. 960] the bill finally enacted.

Mr. McCarthy: May I have just one more word before I go back to cross examination.

Exhibit 92, if the Court please, shows two things. The TVA service area and the area which would have TVA would have had under the bill then before Congress. It says this is what TVA now has; this is what TVA will have if you enact this bill, and Claiborne County is within what TVA now has according to KU.

The Court: Is Kingsport in the TVA area?

Mr. McCarthy: No, Your Honor, Kingsport is not. Kingsport is not shown within the TVA area in any of the maps.

The Court: Isn't it shown on 92?

Mr. McCarthy: No, Your Honor, Kingsport is this area down in here shown as part of the area which TVA would have if the bill then before Congress were enacted, but not as within the area which TVA then had. See the blue is the TVA service area, the areas around it are the additional areas,

Mr. Marshall: If the Court please, we would like simply to reserve an exhibit number, 102, to file Mr. Watt's entire statement as Exhibit 102. We will have to photostat the original book. This is the only one available, if the Court [fol. 961] will permit that. May we do that?

The Court: Yes.

(Exhibit No. 102 to be furnished.)

Redirect examination.

By Mr. McCarthy:

Q. Mr. Wessenauer, referring to the map, Exhibit 96, I ask you whether the outlines of the TVA service area follow county lines or not?

A. It didn't necessarily follow county lines; in many instances they do.

Q. And are there also many instances where they don't?

A. Yes.

Q. Now referring to Exhibit 98, the people of Middlesboro came to the TVA Board and asked for service, did they not?

A. Yes, sir.

Q. And what were they told as to whether TVA could serve them?

A. The language of the Act was explained to them that it specifically excluded service to municipalities that were outside of the service area on July 1, 1957.

Q. Now will you read into the record the last two sentences in the last full paragraph on page 1?

[fol. 962] A. "Mr. Russell of Tazewell asked if it would be possible for them to have a TVA power contract and the TVA representatives explained that it would be legally possible because Tazewell was well within the area served by TVA power on July 1, 1957. The total population of Tazewell and New Tazewell, however, is only about 4,500 people which would be too small to support a separate electric system, and it was suggested that Tazewell might wish to talk to the Powell Valley Electric Cooperative about getting TVA service through that organization."

Q. Now the TVA power contracts with its distributors are requirements contracts, are they?

A. Yes, sir.

Q. Prior to the passage of the 1959 amendment, was there any provision in them limiting the area which a distributor could serve?

A. No, sir.

Q. Is there any such limitation in the contract with Powell Valley?

A. No, sir.

Q. Do you know of any provision of law which would enable TVA now to limit the area which Powell Valley can serve under that contract?

A. I don't.

Mr. McCarthy: That's all.

[fol. 963] The Court: Anything else? Mr. Ardery?

Mr. Ardery: No questions.

The Court: Take a recess.

(Whereupon, a short recess was taken.)

The Court: All right, gentlemen, you may proceed with the witness.

FRANK SMITH, a witness called by and in behalf of the Defendant, Tennessee Valley Authority, after having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. McCarthy:

Q. Please state your name and address.
A. Frank Smith, Knoxville, Tennessee.
Q. You are a member of the Board of Directors of TVA?
A. Yes, sir.
Q. For how long have you been a member?
A. Since November the 14th, 1962.
Q. You were appointed by the President and confirmed by the Senate?
A. Yes, sir.
Q. And you took an oath of office?
A. That's right.
Q. Who are the other Board members?
[fol. 964] A. Mr. A. J. Wagner and Mr. A. R. Jones.
Q. How long has Mr. Wagner been a member of the Board?
A. Since 1961.
Q. He is the Chairman of the Board?
A. He is the Chairman of the Board.
Q. What was his position prior to 1961?
A. He was General Manager for a number of years before that.
Q. How long has Mr. Jones been a member of the Board of Directors?
A. Since 1957.
Q. What was your position prior to becoming a member of the TVA Board?
A. I was a member of Congress.
Q. What committees did you serve on?

A. I was on the House Public Works Committee and the Committee on House Administration.

Q. What matters does the House Public Works Committee handle?

A. Pertinent to this case, it considers all legislation involving the Tennessee Valley Authority.

Q. Is that the Committee that considered the bond financing legislation in 1959?

A. The bond financing legislation was before our [fol. 965] Committee in various forms from 1955 until it was finally acted on in 1959.

Q. Were the hearings handled by a subcommittee or by the full committee?

A. Some of the hearings were handled by a subcommittee; I think perhaps some of them were handled by the full committee. Most of them were handled by the Subcommittee on Flood Control.

Q. Were you a member of that subcommittee?

A. I was a member of the Subcommittee on Flood Control and attended virtually all of the hearings and presided at about half of them.

Q. We have introduced here as Exhibit 93 the minutes of a meeting of the Board of Directors held on August 26, 1964, at which the Board adopted a resolution relating to the service area of TVA in Claiborne County, Tennessee, specifically fixing the area within the area for which TVA was the primary source of power supply on July 1, 1957. Did you attend that Board meeting?

A. Yes, sir.

Q. Did you vote for that resolution?

A. Yes. All three Board members voted for it.

Q. Did you give consideration to the various maps and documents which were filed as exhibits to that meeting?

A. Yes, sir.

[fol. 966] Q. What other fact did you take into consideration in arriving at your conclusions?

A. We took into—I took into consideration the memorandums filed by Mr. Wessenauer and by Mr. McCarthy, the counsel, and we also took in our knowledge of the legislative history of the TVA Act which was very well known to all of us, having been participating in it in some fashion.

Q. Are there any parts of that legislative history that you would like to comment on?

A. Yes, sir, I would. Those parts pertinent to this trial.

As you know, the self-financing plan for TVA was pendant in Congress for, oh, four or five years before it was—became law in 1959.

Mr. Marshall: Excuse me, Mr. Smith, may I interrupt you?

I would like to object to this entire line of testimony. I don't think this is competent to prove legislative history. The legislative history is recorded in the official documents of Congress and because Mr. Smith, a member of the Board of Directors of TVA, happened to be on some of these committees; I do not think makes him a competent witness here to come and add to the recorded legislative history.

Mr. McCarthy: Now it is true, Your Honor, that the [fol. 967] legislative history is available, but it's very voluminous. There were numerous hearings, several reports, the dates and so forth, and Your Honor has indicated that you expect to decide this case on the basis of argument without additional briefs and I feel that under those circumstances, it would be helpful to have some references made here through Mr. Smith to the pertinent legislative history.

Now Mr.—I am not putting Mr. Smith on as a former member of Congress to testify as to what Congress considered. That is not my purpose. But Mr. Smith is a member of the TVA Board of Directors. When a man comes to the TVA Board, he doesn't leave his past behind him, and when he makes a decision and facts in his life relevant—previous to the time that he came on the TVA Board are relevant, he can't put them out of his mind.

Mr. Marshall: He said he isn't undertaking to offer him as an ex-member of Congress, but he asked about five or six questions to bring out that he was a member of Congress and members of committees that considered this bill and other matters relative to TVA legislation.

Mr. McCarthy: Simply goes to his qualifications.

[fol. 968] The Court: Well, what is his authority on—this is the first time this has come up. Does a Congressman, a member of a committee have a right to testify on what

occurred in a committee, and is the Court to take what the Congressman says plus the written record, or to take the written record exclusively as to what the Congressman said, or is he to take what the Congressman said plus the written record?

Do you have a case on that?

Mr. McCarthy: No, I don't have, Your Honor, and I am not offering Mr. Smith as a former Congressman. I am simply offering this for the limited purpose of explaining the reasons why he, as a member of the Board of Directors of TVA, thought that the decision which he voted for was correct, and as I say, it isn't possible for a man to divorce his present action from his past life, and his experience in the Congress undoubtedly was a factor which he took into consideration, his own views, his knowledge, and I think it goes to the question of whether the decision of the TVA Board—or rather the weight to be given to the decision of the TVA Board, whether the Court's function is to look at this matter initially or simply to review the decision of the TVA Board to determine whether it was taken in good faith and was not arbitrary and capricious is a very [fol. 969] important question in this lawsuit.

Your Honor expressed some views on that yesterday.

The Court: Not on that.

Mr. McCarthy: I feel very strongly that the question here, the legal question before Your Honor, is whether the TVA Board acted in good faith and whether its action is a valid action, not subject to being set aside on the ground of arbitrariness or capriciousness.

The Court: Well now, you said yesterday, as I understood you that—the point that arose yesterday as I recall was whether or not the findings and conclusions of the Board were final. We all presuppose that the Board didn't act arbitrarily, and at that time, I expressed the view that in a case like this that the Board's findings and conclusions would not be binding necessarily on the Court, that the Court would have to decide itself.

Now you disagree with this.

Mr. McCarthy: I disagree very definitely with Your Honor on that.

The Court: Well——

Mr. McCarthy: And I hope to be able to persuade Your

[fol. 970] Honor as to the correctness of our position before this is through. I hope Your Honor's mind isn't just completely made up on that.

The Court: Well——

Mr. McCarthy: But I think that the position that we take is supported by all of the authorities and we think it is the position—we think it is the only way that questions of this kind can really be resolved.

We feel that Congress appointed a TVA Board; they have taken an oath of office too; they have responsibilities; those responsibilities deal with the improvement, the implementation of the welfare of this region, and they have a responsibility to see that low-cost power gets to the areas which they are permitted to serve, so that it can make its contributions to the welfare of the region.

That, as I see it, is a decision which, of necessity, had to be put on the TVA Board, because they can bring to that all of their experience, their knowledge of TVA, their knowledge of the TVA power system. They know all these factors that a Court cannot possibly assimilate in three or four days of testimony. And we think that the Congress intended that the TVA Board make that decision and that [fol. 971] if the Plaintiff has standing to sue—and we think it's clear that it doesn't have—but if it does, that then the function of the Court is to look at that decision and see whether it was taken in good faith and was not arbitrary and capricious.

We don't think Congress ever intended that this Court, with all the work that it has, and all the important matters that it has to decide, should take its time trying to draw a line between the primary service area of TVA and the primary service area of the utilities.

The Court: Well, if it's as easy as all of that, why didn't you just persuade the Congress to write that in the Act?

Mr. McCarthy: Well, Your Honor, we didn't need to write that in the Act.

The Court: You think it's implied?

Mr. McCarthy: I think it's clearly implied in the Act, and I might turn that around a little bit and say that the cases all hold that a party in the position of the Plaintiff has no standing to sue unless Congress expressly gives it, and I

might say the Plaintiffs who are the people who were writting these area limitations, we weren't looking for them.

Mr. Marshall: Wait a minute. The Plaintiffs didn't write [fol. 972] the area limitations.

Mr. McCarthy: Well, the power companies were the parties who were looking for these area limitations, and if they thought that they could get through Congress a bill which said the Plaintiffs shall have standing to sue, a right is hereby conferred upon the Plaintiffs, they may go to Court, or any one of a thousand ways it could have been said, it would have been in that Act, and it isn't there.

The Court: What we are on here is the objection of the power company, and if it becomes necessary to pass upon this objection in order to reach a decision upon the merits, the Court will do so.

The Witness: The TVA self-financing legislation, as I said, was first considered back in 1955. In 1958, the House Committee approved a bill which was—didn't get to the House floor before the conclusion of that particular Congress, adjournment of the session, and the end of that Congress, and in the meantime, the Senate had passed a—in 1959, the Senate had—a bill had been passed by the Senate which was referred to in the previous testimony in regard to the boundary.

In 1959, the legislation was taken up again in the House. The proposal had been made in the Senate bill in regard to [fol. 973] defining the boundaries of TVA service by the counties, but that actual idea was never considered in the House committee, because it was known even before our hearings came up that Congressman Vincent of Georgia was going to offer an amendment involving devining the limitation of TVA power service area.

Mr. Marshall: If the Court please, he's departing from the record. He's saying it's known before the hearing that Congressman Vincent was going to do something. One Congressman telling another Congressman. I don't think that's competent.

The Court: Well, I'll get to that.

The Witness: Mr. Vincent presented his amendment, and in pertinent arguments made in this case, he said that he spoke in behalf of his constituents who worked and owned stock in the Georgia Power Company, made it very clear

that his amendment was made in behalf of the Georgia Power Company and his own testimony, as shown in the hearings.

It's been—these hearings have been referred to as a report. As Your Honor knows, the hearings are no means of a report. A report of a Congressional committee does specify the legislative intent of the committee, and the ideas of the members of the committee about what their [fol. 974] hearings hold, I mean about what the legislation will do. The hearings of course contain all sorts of comment which is purely no more than somebody—just a presentation of what was before the committee.

The testimony of Mr. Watt, the president of Kentucky Utilities Company, I was present the day it was submitted in the form of a statement, and it was not presented to the committee in person, and with all due respect to its effect on the bill, it was presented along with large stacks that looked about like this stack in front of the committee there.

The Court: Who is Mr. Watt?

The Witness: He was president of the Kentucky Utilities Company.

Mr. Rowntree: He is the gentleman that wrote the report that we took that red colored map out of on the cross examination.

The Witness: Well, let me make it clear it wasn't a Congressional report; it was testimony submitted to the committee.

When the Vincent amendment was adopted as a means and was adopted, I think virtually unanimously, by the committee as a legislative tactic. It was voted for by the TVA supporters on the committee, Mr.—and other mem- [fol. 975] bers of the committee who were favoring the TVA self-financing legislation, and it was decided that that was—the amendment was necessary in order to secure passage of the bill, and because—and also to avoid possibility of some other type of amendment that might have been more restrictive in regard to the area limitations.

The Vincent amendment was supported by all of the members of the committee including the proponent of the legislation, but there were reservations about it expressed in the minority reviews. In other words those who felt that TVA should be more further restricted in regard to the

service area, and as expressed in the official report of the committee, the minority views, these members of the committee said that they were fearful that under the amendment adopted that TVA would expand its territory.

In all of the consideration of the maps, the other area about what TVA territory was, it was—the committee accepted the proposition that all of the State of Tennessee with the exception of Kingsport was within the power service area, primary power service area, of the Tennessee Valley Authority.

At the time when the Senate bill was presented and at the time when it was not known what the final limitation [fol. 976] was going to be, although it was obvious there would be an area limitation, a number of Congressmen who represented areas on the fringe area of TVA came forward with amendments to make specific—make it specifically clear that a certain town or a certain area was not exempt from TVA service because that town for various reasons didn't then have a power contract with TVA, but was either in the process of trying to negotiate one, or there was some sentiment in the town for it, and the Congressmen wanted to make it clear that they would not be precluded from that service.

A number of towns were written in that respect but others were not written, because the members of the committee made it very clear to the Congressmen who were interested that under the provisions of the bill as it was brought to the floor with the so-called Vincent amendment, that many of the adjacent areas would be eligible for TVA service if they so requested it under the terms of the provision that provided that TVA could serve either an area or a community which was within the primary power service area of the Tennessee Valley Authority on July 1, 1957, or was within a five-mile edge of this periphery, the overall. Those two provisions in regard to the area limitation made [fol. 977] allowance for so many of these areas.

Then there was no concept on the part of the members of the committee that any part of the State of Tennessee, or any—would be barred from Tennessee Valley Authority power service except the city of Kingsport which Kingsport exception was made clear both in testimony and in— was referred to several times and it was obvious that that

was made clear that Kingsport was the exception, but throughout the consideration of the bill, the general concept was that—the entire State of Tennessee with the exception of Kingsport was in the primary service area of the Tennessee Valley Authority.

There are limitations about what—as written into the law, which the Board fully recognizes. A few months ago, the Board, after long deliberation and with considerable qualms decided that an area in western Kentucky called the—so-called—the cooperative in western Kentucky, the Jackson Purchase Cooperative was not eligible for TVA power under the terms of the restriction even though a large part of that cooperative service is within five miles of the previous service area boundary, and there is a considerable case in regard to the primary power service area, but these restrictions acknowledge the fact that the Con- [fol. 978] gress could not draw a line by mile and yard as to where would be the practical boundary line between TVA and some of the various adjacent power companies. It was acknowledged that the interest in a sharper boundary than the counties was developed in the State of Georgia, and all of the testimony developed from the—in that regard, practically all of it in regard to the interest of the Georgia Power Company and the areas that it served, the—as in many other laws in regarding specific interpretation and specific decisions, Congress acknowledged that it would be impossible to make—to legislate in advance in regard to specific decisions that had to be made about interpretation of the law and that authority was defined by the TVA Board.

Mr. Marshall: What was that last statement? I didn't hear that.

The Witness: Had authority to specifically define the area where service could be provided was assumed would be given to the TVA Board.

Mr. Marshall: Assumed it would be given; was that the testimony?

The Witness: Well, it was given under the terms of the law. I mean the Congress assumed that it was being given that way, and because the law made no other provision. [fol. 979] The bill made no other provision. It became law, of course.

There are many other federal statutes, federal laws giving authority to various agencies where these decisions are in the hands of the administrative agency or the board that's in charge of the administration, and there is no other concept in the consideration of the legislation than that these specific definitions as to the exact boundary would have to be set by the Board of Directors.

There were no—as the minority report fo the House Committee, I think—which is a part of the official record, and I want to make clear again that the testimony referred to earlier was not in a report, it was purely something submitted to the committee, part of a very large and voluminous material submitted to the committee—but I think it is worth the Court considering the—these are the—this is the words of the minority report. It is on page 49 of the House Committee report.

"There is a great danger that the language added to the Vincent amendment may be used to open the door to many communities in the periphery area to discard existing contracts with electric service companies and seek connection with the TVA system."

[fol. 980] And that was specifically how the language was written by the majority of the Congress so that these communities could do that. These opponents of the bill made very clear that they were fearful that it could be done, and the law—but the law was passed over their objections, signed by President Eisenhower and the TVA Board of Directors took its action on the basis of the language of that amendment.

The Court: Now is the House Report in the record? I have been furnished with a report from the Senate, but I don't think I have seen the one from the House.

Mr. McCarthy: We will be glad to supply a copy of the House report. I don't think we need to file it as an exhibit, but we will make it available to Your Honor.

Mr. Rowntree: If Your Honor please, these reports did come before the final amendment was made on the floor.

The Court: You mean final amendment, the territorial amendment?

Mr. Rowntree: Yes, sir.

The Court: Is what you are talking about made on the floor of the House?

Mr. Rowntree: Of the Senate, Your Honor.

[fol. 981] The Court: Of the Senate.

The Witness: Well, I'm not in a position to go into the argument, but the basic territorial amendment is acknowledge by every student of this legislation and it's acknowledged in all of the debate is the so-called Vincent amendment. These exceptions and variations were written further on the floor. All of the variations that were written further had the net effect of reducing the limitations of the Vincent amendment.

By Mr. McCarthy:

Q. They were all liberalizing amendments?

A. Liberalizing is what I'm trying to say. For instance there was an amendment in the Senate providing that a cooperative in Mississippi outside of the boundary would serve an air base. There were amendments adopted on the floor of the House allowing some towns in Mississippi where it was—the members of the committee had assumed that they would, under the Vincent amendment as modified, that they would qualify for service, but the member from that district wanted to make sure that he had shown his people that they qualified, so they were written in specifically on the floor, and there were—all of the amendments in the Senate, I don't know—there were others, I'm sure, and which became part of the final version had the effect [fol. 982] of liberalizing the Vincent amendment. Any consideration of legislative history of the bill will, I think, make it very clear that the Vincent amendment was the amendment in regard to the TVA boundary.

Q. Now, Mr. Smith——

A. And which was adopted within the committee of the House Public Works Committee.

Q. This legislative history as you have recited it here was that one of the factors that you have considered in voting for the resolution at the Board meeting of August 26th?

A. Certainly it was, and because of the—I didn't consult the other Board members, but the whole history, legislative

history was part of the background of all of our considerations of these service requests.

Q. Mr. Jones was a director during all of this time?

A. That's right.

Q. And Mr. Wagner was general manager?

A. That's right.

Q. And they were thoroughly familiar with this legislative history?

A. That's right.

Mr. McCarthy: No further questions.

Mr. Marshall: If the Court please, at this time we move to strike his entire testimony. After the statement that he [fol. 983] was not offered as a Congressman, he testified ninety per cent of the time as a Congressman, and answered two questions as a director. His testimony as a Congressman was replete with what was in the minds of the members and assumed by the members completely outside of the record.

Now if it's competent for a member of a legislative body to come and recite legislative history in the manner in which Mr. Smith has undertaken to decide it, there would be no end to ever proving the legislative history. You get a bunch of Democrats on one side and a bunch of Republicans on the other, and in a case of any significance, and away you go.

The basis of our objection is that it is not competent for a member of a legislative body——

The Court: I am presently of the opinion the Court is bound by the written legislative history, instead of testimony by a Congressman or multiple Congressmen, but neither side has cited me authority on it.

As I say, I have never had the question come up before.

Mr. Marshall: We had no reason to anticipate it at all.

Mr. McCarthy: Your Honor, this is offered for a limited [fol. 984] purpose, to show the considerations that the TVA Board had before it, and I think it is clearly admissible for that purpose.

The Court: Mr. McCarthy, the oral legislative history or the written legislative history?

Mr. McCarthy: Your Honor, insofar as Your Honor will rely on the legislative history in making any determination

as to what Congress intended, I will agree with counsel that it is the written legislative history, but when Your Honor is passing on the question of whether the action taken by the TVA Board was taken in good faith or was arbitrary or capricious, I think Your Honor has to consider the information that the members of the Board had before them and the reasons that they had for voting for this resolution.

The Court: Mr. Marshall, do you contend that the Board's action is not in good faith?

Mr. Marshall: You put me on the spot. I'm reluctant to come out and say not in good faith, because of some of the connotations.

The Court: I have been going on the theory that that was not an issue, but if I am wrong about it, I should find out right now.

Mr. Marshall: I don't want to stand here and accuse Mr. Smith of bad faith in some of the connotations of bad faith, [fol. 985] but I would say that the action of the Board was a very purposeful action on partial information and involved very largely an interpretation of the law rather than a finding of fact.

Mr. McCarthy, in his statement to the Board, in his opinion to the Board, acknowledged that a part of Claiborne County, Tennessee was not in TVA's factual service area, but then he comes along and says "we can write that out by finding that it was."

Mr. McCarthy: Don't put words in my mouth.

Mr. Marshall: I'll read your words.

"A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a matter for the Board to decide. It is my view that considering the relatively small area included in these portions of the county and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Mr. Wessenauer, back in his factual account, had already [fol. 986] recited that these areas in Claiborne County were in fact served by KU, and then they come along and say, "We'll just write that out by finding that all of Claiborne County is within the service area."

I don't want to charge that they were acting in subjective bad faith, but I think what they were doing was highly improper, if you will permit me that qualified answer.

Cross-examination.

By Mr. Marshall:

Q. Mr. Smith, did I understand the substance of your statement to be that Mr. Watt's statement was simply filed? I believe it was toward the end of the day, and there wasn't time to hear him, is that correct?

A. That's right.

Q. And then did you suggest in substance that his statement really wasn't considered and had very little effect on the bill, if any? Is that about what you said?

A. I have forgotten precisely what I said.

Q. I'm not trying to quibble with you on words. Is that the substance of your answer?

A. I think in all honesty, I would have to say that Mr. Watt's testimony had nothing whatever to do with what happened to the bill.

[fol. 987] Q. All right, that was what I thought you testified to.

Now the testimony of Mr. Watt that had nothing whatever to do with the bill was the statement in which——

The Court: Now, Mr. Marshall, I have lost the connection with Mr. Watt's testimony. What testimony did he give that you rely on here, if any?

Mr. Marshall: If it please the Court, we didn't initiate the discussion of Mr. Watt's testimony. TVA relies upon a map filed with that testimony as being something that affected the understanding of Congress when it passed this legislation. That is their finding in their Board of Directors report or minutes.

Now this map which they were relying on as having contributed to the understanding of Congress——

The Court: That's Exhibit 92?

Mr. Marshall: Exhibit 92, was submitted with the prepared statement of Mr. Watt that Mr. Smith now says didn't have any effect on the bill at all, and wasn't considered. That's the only thing I wanted to establish right at this moment.

The Court: All right.

By Mr. Marshall:

Q. Now, Mr. Smith, knowing that Mr. Watt's—knowing [fol. 988] as an ex-Congressman, that Mr. Watt's statement and Mr. Watt's exhibits had no effect on Congress, didn't influence the understanding of Congress, did you as a director of TVA recite the presence of this map in the Congressional Record as evidence for a decision that all of Claiborne County was——

A. That map made it very clear that Kentucky Utilities was giving up Claiborne County, so it was something that——

Q. Was this map offered to persuade this Court that Congress understood that Claiborne County was within the service area of TVA?

A. I didn't make the determination of what to submit to this Court. This is in the hands of our attorneys. But the map, to my mind, makes it very clear that Kentucky Utilities felt that the bill, as passed, provided that Claiborne County would become part of the service area of the Tennessee Valley Authority.

Q. We are going to come back to that statement in a moment.

Did you consider Mr. Wessenauer's memorandum to the TVA Board when you voted for the resolution of August 26, 1954?

A. Yes, sir, but let me—I don't know what you are fixing [fol. 989] to ask about Mr. Wessenauer's, but just like in Mr. McCarthy's question that mentioned this map, we considered the memorandum, but that doesn't mean that we accept them as a hundred per cent valid. If that was the case, there would be no purpose of having a TVA Board. If everything the staff presented us was a hundred per cent correct, there were be no point in passing on it. Of course we consider everything.

Q. Then you considered Mr. Wessenauer's memorandum, didn't you?

A. Yes, sir.

Q. Now Mr. Wessenauer referred to this map, Exhibit 92, didn't he, as having been submitted to Congress?

A. That was one of the items, maps, he referred to as having been submitted to Congress. I recall specifically there were two that——

Q. You say you do or do not?

A. I recall specifically having seen those during the testimony.

Q. The two others?

A. The other two.

Q. Only two?

A. I have made it very clear that I didn't see that map at the time Congress was acting.

Q. How many maps did Mr. Wessenauer submit on August 26th?

[fol. 990] A. I'll have to check the memorandum to tell you.

Q. Test your recollection first, how many maps did he submit?

A. I think he made reference to three.

Q. Which three were they?

A. There were two that have been presented this morning.

Q. Which two were they?

A. I don't have a stenographic transcript in front of me. These two right here.

Q. All right, you are referring to Exhibits 94, 95, and 92, I believe.

A. They are so labeled.

Q. And those are the three that you recall?

A. Those are the three that I specifically recall. There could have been—That's all I recall at the moment.

Q. Do you understand these maps, Exhibits 94 and 95 to be something Congress considered in passing the final TVA bill?

A. Let me see. I don't have——

Yes, they had been considered by the Congress.

Q. You think Congress——

A. But I would like to—well, they were considered by the Congress.

Q. And are these maps referred to in the minutes of the [fol. 991] Directors' meetings as something that influenced you to decide that Congress had an understanding that all of Claiborne County was in the TVA area?

A. I don't know what the minutes of the Directors' meeting say, but there should be nothing in the minutes that say anything influenced me.

Q. No, I ask you now, is the fact that these maps were before Congress one of the things that influenced you to a determination in your own mind that Congress understood that all of Claiborne County was in the TVA service area when it passed the——

A. That was one of many things.

Q. You think thees maps are relatively accurate maps?

A. They are relatively accurate, that's right.

Q. Would you be willing to rely on them in defining the TVA service area?

A. I would not rely on either one of them to define the TVA service areas in terms of inches, miles, yards and inches of where the line is, because they are not as you can see, they are very small scale by comparison with——

Q. So it would have been pretty unusual for a map of this scale to have come down and shown the corridor to Tazewell, wouldn't it?

A. It would have been—Congress is very conscious of [fol. 992] state and county boundaries, because they are political subdivisions from which members of the Congress are elected. That was what was looked at and that's why Congress had the assumption and the knowledge——

Q. We don't——

A. Well, let's say the knowledge the members of the committee had the knowledge that under the terms of the Act that the entire state of Tennessee with the exception of the town of Kingsport was within the TVA service area.

Q. And with the exception of the town of Dyersburg, so much so that they had to make a specific exception for it, didn't they?

A. We told the Congressman involved that under the terms of the bill that he did not have to, but he was the late Jere Cooper, a very important and popular member of

the Congress, and if he had wanted to except every town in his district, we would have written them in.

Q. Now let's get back to this map. You say this map is now down to inches in defining the TVA service area or miles?

A. No, not in exact miles. By its very nature, it could not be as you see.

Q. That's right, that's my question.

A. But it's very clear in regard to state boundaries.

[fol. 993] Q. Well, there's a great big corridor coming up here in Georgia, coming clear up here to this state line that's defined on this map. Do you see any corridor on this map Exhibit 94 like that?

The Court: Now you pointed out on Exhibit 96, Mr. Marshall.

Mr. Marshall: Yes, I'm referring to a corridor on the western edge of Georgia going up to the—which on other maps is shown to include the town of Trenton which is in fact served by Georgia Power Company.

The Court: And you handed the witness exhibits what?

By Mr. Marshall:

Q. Exhibit 94, and 95, and I'll ask if that corridor is shown on either of those maps?

A. That's right.

Q. Would you understand that to mean, the absence of this corridor before Congress, that TVA could close in this corridor around Trenton and take all of that service area, because it was not shown in these maps presented to Congress?

A. I would like to make it clear that the maps were not the basis for the Congressional action or of the Board's action. That would be one of the factors if the town of [fol. 994] Trenton applied for service. I would have to check on the service area and other factors. It would be one of the considerations given, but not solely the map.

Q. You didn't answer my question. I asked if you would be willing, is it your position that because these maps before Congress, that this map did not show this corridor of Georgia Power service up to Trenton, is it your position that TVA could close in that corridor and take that service

from Georgia Power Company because that corridor wasn't on these maps?

A. There might be other factors that would make it possible for Trenton to be served. I have never received a report.

Q. You are not willing——

A. I am not willing to make a yes or no answer, whether I've quit beating my wife.

Q. You are not willing to take the position that you could close in this corridor by reason of its absence on these maps?

A. I'm not willing solely to take action on something in Georgia on the basis of those maps any more than we took action on the Claiborne County, Tennessee, matter on the basis of the maps.

Q. Now look up in here in Kentucky, this little wedge here on Exhibit 96. Is the Jellico Municipal area there, do [fol. 995] you recognize it as that?

A. Yes, it's been pointed out to me.

Q. Do you find that on Exhibits 94 and 95?

A. No.

Q. Now that's a TVA service area extending up into Kentucky, isn't it?

A. That's right.

Q. Would you be willing by reason of the absence of the TVA service area on these two maps to give it up to Kentucky Utilities?

A. I would not be willing to take any action in regard to TVA power on the basis of thees maps alone, and the Board——

Q. And Congress didn't either, did it?

A. No, not on the basis of maps alone, that's right.

Q. And didn't even consider Mr. Watt's map?

A. I didn't consider it. I can't speak for the other members of the committee.

Mr. Marshall: That's all.

Mr. McCarthy: No further questions.

The Court: Adjourn until 1:20.

(Whereupon, at 12:00 o'clock noon, Court was adjourned to be reconvened at 1:20 o'clock p.m.)

[fol. 996] Afternoon Session

(At 1:30 p.m., court reconvened pursuant to the noon recess, when the following proceedings were had.)

The Court: You may proceed with the testimony.

Mr. McCarthy: May it please the Court, we have at this time the discovery deposition of Mr. Wilson House, and ask that it may be received as read.

Mr. Marshall: No objection.

Mr. McCarthy: If that is acceptable, and I think that concludes the proof TVA would put on except that we may wish to put Mr. House on later to supplement it, but in the meantime we would like the cities to go ahead with their proof.

The Court: All right.

Mr. Marshall: If the Court please, we would like an opportunity this evening to look over this deposition. If they would have Mr. House available for limited cross examination, that would be all right, but I don't at the moment know of anything, if that is all right.

The Court: All right.

Mr. Ardery: May it please the Court, I talked with coun-
[fol. 997] sel for plaintiff and they are not concerning themselves to the order of our witnesses. We have got a couple here that I would like to let go this evening. They won't take long.

They have not been sworn. Maybe you would like to swear them together. Mr. Brooks and Mr. Hurst.

(Additional witnesses were sworn.)

JERRY BROOKS, called as a witness by and on behalf of the defendant Cities, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ardery:

Q. What is your name?
A. Jerry Brooks.
Q. Where do you live?
A. Middlesboro, Kentucky.
Q. Do you have a business in the community of Tazewell or New Tazewell?
A. Yes, sir. In Tazewell, Tennessee.
Q. What is that business?
A. Brooks Furniture Manufacturing, Incorporated.

The Court: Is it Tazewell or New Tazewell?
The Witness: Tazewell, sir.

[fol. 998] By Mr. Ardery:

Q. The plaintiff in this case has introduced an exhibit which is numbered 46 whereby they say, I believe, that that company is obligated to take power from Kentucky Utilities Company, they say this is a contract for service. Will you state what the fact is with respect to the service to your company in Tazewell, how you happen to be on the city system, if that is the case.

A. Yes, sir. I became an active manager of Brooks Furniture in April of '63, and after assuming that responsibility I complained to the Kentucky Utilities officials in Tazewell—I believe at that time it was Mr. Pressnell—about the high utility rates that we were having to pay.

On several occasions he told me that he was endeavoring to see if our rates could be adjusted. Finally he indicated to me one day that he thought he had something favorably worked out. And then a short time afterwards a Mr. Bill Smith and Mr. Kenneth Dixon of Kentucky Utilities Company came to my office and informed me that if I would sign a contract with them that in turn it would effect a

savings to my company, and I asked them to present me with the contract, which they did.

I don't remember whether it was at that meeting or whether it was at a later meeting, but they did if not then, [fol. 999] later, present me with a contract.

When they did I asked them to determine for me what the savings would be, and they computed there in my office that by signing a contract which would require me to buy their power for a period of 12 months that my savings would amount to slightly over $6.00 a month.

I asked them to leave the contract with me, that I would look it over and make a decision.

And then again at a later date Mr. Dixon came to my office representing Kentucky Utilities Company and asked me if I had made a decision as to whether or not I wanted to sign the contract.

I told Mr. Dixon that the savings which they had figured were so insignificant it would be of no help or benefit to my company, that I did not want to obligate myself to that utility company by signing the contract.

Q. Now is this contract here signed for your company or not?

A. Well, this contract which I am looking at is made to Brooks Wood, Incorporated, and it show New Tazewell. Of course, it should be Tazewell, and it is dated February 15, I believe, of 1957.

Q. Is that the same company or a different company?

A. Well, it is a different corporation. The corporation [fol. 1000] was recognized in 1960, I believe, and the name was later changed to Brooks Furniture Manufacturing, Incorporated.

Q. Did you ask for city service?

A. Yes, sir. I have asked for city service and for cheaper power ever since I have been active in this company.

Q. Did any city or any representative of the city, or any representative of Powell Valley, or any representative of TVA, solicit you to ask for city service?

A. No, sir, they did not. As a matter of fact, in the, I believe summer of '63, I took it upon myself and wrote the Chamber of Commerce and addressed copies of the letter to both the Mayors of Tazewell and New Tazewell, urging

them to do what they could to furnish us or help us to obtain cheaper power.

Q. The predecessor company, as I understand it, did take power from Kentucky Utilities Company. How was that service terminated?

A. I called Mr. Pressnell there in New Tazewell, who I believe is manager of the Kentucky Utilities office, and asked him to cut our service, that we were going to buy power from the city, and within 15 minutes——

Q. You asked him to terminate the KU service?

A. Yes, sir.

Q. Go ahead.

[fol. 1001] A. And within 15 minutes of the time that I had talked to Mr. Pressnell on the telephone, our motors and all the power throughout the entire plant went off.

Q. What time of day was that?

A. That was approximately 1:30.

Q. Were people working in the plant at that time?

A. Yes, sir, we had a full crew working.

Q. Did any of the equipment or the motors or anything sustain any damage as a result of that sudden shutting off of power?

A. No, sir. There was no damage. Of course, we had to discontinue work for the remainder of the day and lay all of our employees off.

Q. What happened after that, did the city system come and connect you up?

A. Later in the afternoon they did. When I realized that Kentucky Utilities Company had pulled the meter or service, cut our power off, then I called, I believe it was the Mayor, and told them that we did not have service and that we wanted to get city service just as quick as we could.

Q. You did make written application to the city for service from the city system, didn't you, Mr. Brooks?

A. Yes, sir, I did, and that is my signature.

[fol. 1002] Mr. Ardery: I will ask that this be marked as Exhibit No. 103.

(Exhibit No. 103 was filed.)

By Mr. Ardery:

Q. Mr. Brooks, I wish you would explain to the Court some of the circumstances that are important to you insisting upon city service, from the standpoint of your business?

A. Well, first of all and most important, is just an economical factor with my company, with myself. If we are to continue in business profitably, if we are to remain in an area where we can think in terms of future growth and expansion, we have got to have cheaper power than we are getting from KU.

Q. What is your major competition?

A. Morristown Chest Company is our biggest and we consider practically our sole competition, in that they are the only other manufacturer in this area that is manufacturing cedar products.

75 to 80 per cent of our total production is devoted to cedar furniture, and that is likewise true, I think, of Morristown Chest Company.

Q. How many people do you employ?

A. At the present time we are employing 33 people.

[fol. 1003] Q. What is your relative standing in the community of Tazewell and New Tazewell as to being the largest or near the largest employer in the community?

A. Well, at the present time there is a plant under construction, I believe it is the Tazewell Textiles, Incorporated. When that plant is completed I believe it will be the largest manufacturer from the standpoint of employment. There is another factory, I believe it is Donlan——

Q. D-o-n-l-a-n?

A. I believe that is correct. They, of course, employ more people than we are, and I suppose after that we would be considered the third largest employer in the area.

Q. In active operation now I presume you are the second laregst employer?

A. As of today; yes, sir.

Q. Now what if any plans do you have to enlarge that employment?

A. Well, we have never announced our plans but it has been well discussed and is in the planning stages of the company at this time that in the spring or early part of

1965 we do plan on adding approximately 10,000 square feet of floor space that will be devoted to a warehouse for finished products.

Now we completed in October of last year the installation [fol. 1004] of an automatic sprinkler system, and while we were giving thought to the expansion at that time, when our sprinkler system was installed it was installed large enough and sufficient to take care of this additional nine or ten thousand square feet of floor space that I referred to.

Q. Will this involve additional employment?

A. We estimate that it would add approximately 15 to our employment which would either be in the form of direct production or either in truck drivers and salesmen; yes.

Q. If you had to take KU power what effect would that have on your planned expansion?

A. Well, first of all, if I was required to go back to KU Company as a source of electrical power, I would consider it a very serious setback and blow to our existing operation that we have today.

Secondly, it would cause me to give very serious and doubtful thoughts towards trying to expand in my area. And I feel rather strongly on this because, and I have to make money in my business, I am going to if I stay there, but I would not hesitate to look very favorably upon any other offer which would be made by another community that would help me relocate if I could obtain cheaper power.

Q. Now the Tennessee Valley Authority and Powell Valley Electric and the Cities are accused of having conspired [fol. 1005] to take certain of KU's customers.

So far as you know have any of these parties conspired to take you away from KU?

A. No—no, sir, not to my knowledge. They never have in my presence.

Mr. Ardery: That is all.

Cross-examination.

By Mr. Marshall:

Q. Mr. Brooks, who is Mr. J. H. Brooks, is that you or your father by any chance?

A. That would be my father.

Q. Your father?

A. Yes.

Q. And was he an officer in Brooks Wood, Incorporated, in February of 1957?

A. Yes, sir.

Q. And I take it there is no question that this is your father's signature then on this Exhibit 46, this 1957 contract?

A. Yes, sir, that is his signature.

Q. And when was Brooks Wood, Incorporated, reorganized to what you now state is Brooks Furniture Manufacturing?

A. Brooks Furniture Manufacturing, Incorporated.

Q. When did you reorganize that place?

[fol. 1006] A. I believe it was 1960.

Q. And at that time were you associated with the company?

A. I was a stockholder but I was not active in any way with respect to the management.

Q. And I believe you said you came down, became manager of the company in April of 1963?

A. That is correct.

Q. The only purpose of these questions is that this contract and the electrical service being furnished under this contract were apparently taken over by Brooks Furniture Manufacturing Company and at the time you came down in April, 1963 Brooks Furniture Manufacturing Company was buying power from KU, was it not?

A. They were, yes, sir, but as far as saying that Brooks Furniture took over the contract, I personally had no knowledge of that contract.

Q. But they were getting service from KU?

A. That is correct.

Q. And then a different contract was discussed with you and offered to you but not entered into, right?

A. Yes, sir; that is correct.

Q. Do you recall the date on which KU disconnected your service?

A. Without being positive, I believe that it was on Octo-
[fol. 1007] ber 30 or 31st. I know it was very near the end of the month.

Q. And your application to the City of Tazewell for electric service is dated October 25th?

A. Yes, sir, that is my signature.

Q. Five or six days before the disconnect. You say you telephone Mr. Pressnell and requested the disconnect of KU service. Isn't it correct that Mr. Pressnell said, "Do you want to disconnect it now or when do you want it disconnected?" And didn't you tell him it was all right to come out and disconnect it any time; didn't you have that conversation?

A. No, sir, I do not recall a conversation of that type.

Q. Did you tell him about when to disconnect it?

A. I don't believe that there was discussion of any kind pertaining to the power. I mean to the time.

Q. You just said "Disconnect our service"?

A. Yes, sir, that is correct.

Q. Now in your testimony it is implicit, I think, a little criticism of KU for coming out and disconnecting in the middle of the day, and Mr. Ardery asked you if there might not have been damage to the equipment and you said no, no damage to the equipment but you had to discontinue operations.

[fol. 1008] Wouldn't you recognize that KU would have a little problem in that situation of customers calling up and asking them to disconnect without specifying the time in this operation of Powell Valley and the Cities taking over. How would KU know that there was not a Powell Valley or City crew out there waiting to plug in another meter when they are out there?

In other words, I am suggesting to you if Mr. Pressnell had delayed we might be criticized for delay and holding up that crew in their duties in entering of service. Now, I mean, he came out there when you called and disconnected. Now there is a little criticism because he did what you asked him to do. Does that seem entirely fair?

A. That is not entirely my position on it. The pole which

carries the Kentucky Utilities service is not more than 50 feet to the entrance of my office, and since we had been buying power from KU Company these many years I think Mr. Pressnell, or someone with the utility company, should have at least shown me the courtesy of coming into my office and telling me they were going to cut the service. If they had I would not have objected to it, but I certainly would have gone out into my plant and turned off motors or taken steps to prevent any damage to the machinery. Fortunately no damage was done.

Q. But you did not ask him to come at any particular [fol. 1009] time or to wait until Powell Valley was there; you did not mention time, you just said "Please disconnect my service."

A. To the best of my knowledge there was no mention of a specified time.

Q. I suggest to you that you asked him and in 15 minutes he complied with your request and he gave you good service. He did what you asked him to do very promptly?

A. In that respect he did; yes, sir.

Q. All right. Can you give me an approximation of your total expenses for a year? You may have some idea of your gross receipts or of the expenses making up your costs of sale and your gross profits before taxes. I am not trying to pin you down to the exact figures but generally what are your annual expenses?

A. Well, of course, I did not bring a financial statement with me, sir, and I did not know I would need one.

I don't mind telling you what my profit is for the first eight months of this year as far as a certified—as far as a statement from a certified public accountant.

Q. Well, I am really more interested in your expenses to see what part your expenses is the cost of electricity.

A. Well, I can tell you how much I have saved on buying [fol. 1010] my power from the City, if that would be of help.

Q. Can you tell me how much you have saved over the offered rate of KU that you did not accept?

A. I can get pretty close to it for you, sir. These figures will, of course, require a little explanation.

During 1964 covering the first eight months of this year, we paid to the City of Tazewell $1,768 even.

Now for the same 8-month period of 1963 we paid $2,508.96.

In explaining that, if I may, please, sir, during the winter months from 1964, or let's say the winter of 1963 and 1964, we also supplemented the heating of our offices with electricity which we did not do in the prior year.

Furthermore, we have had an increase in production from 15 to 20 per cent during this same period. In other words, we have had an increase in production during the eight months of '64 over the eight months of 1963.

The difference there, just on the surface, we show a savings to my company of $740.96, but considering these other factors of heating our offices, or supplementing the heat in our office with electricity, and taking we have had a 15 to 20 per cent increase in production, we feel that we are saving approximately $125.00 a month by buying our power from the City as compared to a six dollar and few [fol. 1011] cent saving that the KU company offered me to sign a contract for 12 months that would have obligated myself to buy their power.

So I consider these figures very advantageous to both myself and to my company.

I might add this, if I may, that these savings that we have enjoyed since buying power from the City of Tazewell represents a very recognizable large per cent of the net profit that my company has enjoyed during the first eight months of 1964.

Q. Are you able to tell me what percentage of your expenses it represents?

A. No, sir. As I say, I did not bring a financial statement. I couldn't give you that information.

Q. If your electricity bill was $1,700.00 for eight months, what was your labor cost?

A. Well, I am just not in a position, I don't—I would be glad to tell you if I had the information.

Q. How many employees——

A. I couldn't have told you this unless I had brought it with me. That is the reason I did.

Q. How many employees do you have?

A. 33, sir.

Q. What is your average hourly rate?

A. $1.25 for the biggest per cent of our employees, and

[fol. 1012] then we have three people that are on salary. That, of course, would amount to considerably more. We have three truck salesmen, and these truck salesmen are earning anywhere from three to fifteen hundred dollars a month.

Q. Are you working much overtime with this increased production?

A. We have had some overtime in the last three weeks, however, I don't believe that it would have shown up in these figures that I just gave you.

Q. Are you normally working a 40-hour week?

A. Yes. We work a few men sometimes half a day on Saturday.

Q. Just some rough figuring suggests that your monthly payroll must be in the neighborhood of $20,000.00, is that correct?

A. No, sir, you have missed that considerable.

Q. Somewhere in the neighborhood of $6,000.00 or $7,000.00 a month?

A. Yes, sir, that is close.

Q. Seven thousand a month then comes to something like $84,000.00 a year, roughly, as your payroll?

A. That is pretty close.

Q. And this savings of $700.00 over two-thirds of a year as against a payroll of $84,000.00 a year, is not going to determine——

[fol. 1013] A. I think that is a little high for 1963. Of course, we have not completed the year 1964. I think the payroll figures that you are computing there is high for 1963.

Q. Well, I do not think a savings on 1964 electric costs over your 1963 payroll costs would be a fair basis for comparison, and this $700.00 in your electrical cost, which may be as much as a thousand dollars a year, against the eighty-odd-thousand dollars is going to make or break you.

A. It is going to amount to more than a thousand dollars a year. We think it will be not less than $1,500.00 or probably $1,800.00.

As I pointed out, these figures that I have here, while they are actual, there are also those other factors that influence them, such as the heating of our offices and increased production that we are having during 1964.

Q. Well, the point is, that your cost of electricity under anybody's bill is very minor compared to your labor cost and we haven't even talked about raw materials, have we?

A. No, sir. That is the reason I agreed to tell you what my profit is.

Q. I don't want to be in the position of asking and I still [fol. 1014] would not ask you. I feel that is a man's personal business.

A. We work for a profit, not just to figure the cost of materials or cost of labor. It is the profit that is the end result with me and my company.

When I take my savings as to what they will be as a result of buying my power from the City and compute that against my net earnings, that is the end result of my personal efforts.

Q. You are not embarrassed by working for profit, are you?

A. No, sir, I am not.

Q. You believe in private enterprise, don't you?

A. Yes, sir, I do.

Q. I just want to say that Kentucky Utilities believes in it too and we are not embarrassed that we work for a profit.

A. But I hesitate to pay excessive rates to the KU Company.

Q. Excessive rates. What is an excessive rate?

A. More than you can buy from someone else.

Q. Have you gone before the Tennessee Commission to see if KU is charging an excessive rate?

A. No, sir. I would not expect to accomplish anything if I were to do that. I know in Kentucky we have endeavored [fol. 1015] to get low rates and we haven't succeeded in that state.

[fol. 1016] Q. Before these commissions who know something about electric rates. Have you tried before the Kentucky Commission?

A. I think the city of Middlesboro has.

Q. You say you think they have. I don't think they have. Do you know that they have?

A. No, sir, I don't know that they have. I know that there's been quite a controversy over the rates that the people in Middlesboro are having to pay the utility company.

Q. And was there an election in Middlesboro last year?
A. Yes, sir, there was.
Q. And the citizens determined to stay with Kentucky Utilities Company?
A. Yes, sir, they did.

Redirect examination.

By Mr. Ardery:

Q. Mr. Brooks, there was an election in Tazewell too, wasn't there?
A. Yes, sir, I understand there was.
Q. Was there any issue in that election about who the people wanted to serve them power?
A. That was the main issue to my knowledge.
Q. Did the people on KU's side win or lose that race?
[fol. 1017] A. They lost, the Kentucky Utilities people did.

Mr. Rowntree: Did I understand you to ask about an election in Tazewell?

By Mr. Ardery:

Q. This is Exhibit 55 of the Plaintiff. Is this a picture of your establishment?
A. It's part of it.
Q. One other question. What was your profit for the period that you said that you were able to give it?
A. You mean the first month—the first eight months of '64?
Q. Yes, sir.
A. Yes, sir, our profit during that eight months was sixty-four hundred dollars and some cents.

Mr. Ardery: Thank you very much.

Recross-examination.

By Mr. Marshall:

Q. Can you give us an approximation of your annual gross sales, say for '64, what do you expect?

A. For '64?

Q. What do you expect it to be? We are eight months—or give us the '63 figure if you prefer.

A. The '63 figure was approximately two hundred fifty thousand dollars. Now we are anticipating that the '64 figure and hoping that it will be from two seventy-five to [fol. 1018] three hundred thousand.

Mr. Marshall: Thank you.

Witness excused.

Mr. Ardery: Mr. Hurst.

Cecil Hurst, a witness called by and in behalf of the Defendants, after having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ardery:

Q. State your name, please.

A. Cecil Hurst.

Q. Where do you live?

A. Tazewell, Tennessee.

Q. What is your business?

A. Restaurant business.

Q. What is the name of the restaurant?

A. Skyview.

Q. Where is it located?

A. It's about a mile—it's in the city limits, about a mile—it's in the city limits of Tazewell.

Q. How long have you been in that business, Mr. Hurst?

A. Six years.

[fol. 1019] Q. Do you have a house adjacent to the Skyview Motel?

A. Yes.

Q. How far back from it?

A. Oh, I'd say it's about three hundred yards.

Q. I hand you a picture which has been made Exhibit No. 49 and ask you if that is a picture of your restaurant?

A. Yes, sir, it is.

Q. And one marked number 56, and ask you if that is a picture of part of the land or the line leading into your residence?

A. Yes, sir, it is.

Q. Now, Mr. Hurst, it has been testified to that yours was the first establishment cut over to the new city system. Will you tell the Court the circumstances under which that switch was made?

A. Well, sir, I put in an application with the city, I believe in October, 28th—last October, '63, and along about that time, I called Kentucky Utilities' office, and I couldn't get any answer. Well, I called two or three times, so about an hour later, I saw the service manager go up the road, and I thought I'd get out and take after him, and tell him, and went up the road about a mile, and he turned around and I stopped and talked to him, and as soon as I started [fol. 1020] talking to him, he run off, and left me, and I had to run him down again, and I run him down in New Tazewell, and I blowed my horn, and he pulled over and stopped, and I told him I would like to discontinue Kentucky Utilities, and he said, "I'm not going to do it, I can't change, I can't take it loose." And so that was all that was said, and I come back to the restaurant, and in the meantime, I told him I'd give him one hour to change it, and then I'd get the city to change it. And we waited about an hour and there was a contractor there, and we just changed over.

Q. Do you know who that contractor was?

A. No, sir, I don't know his name.

Q. Was it a Powell Valley crew of a separate contractor, if you know?

A. It was a separate—I don't think it was a Powell Valley crew.

Q. Well now, who actually made the switchover? Where did the meters come from?

A. I got the meters, I went over the hill—there's a sta-

tion over there—and got the meters myself and me and this contractor did and brought them back, and we put them on.

Q. Did you personally give the order to cut KU off and connect up to the other system?

A. I did.

[fol. 1021] Q. Now the Tennessee Valley Authority and the Powell Valley Electric and the towns are accused of conspiring to take KU's customers away from them in this area. Did anybody so far as you know or among these defendants conspire to take you as a customer away from KU?

A. No, sir.

Q. Whose idea was it that you get this city service?

A. Well, I got in through the city; I put the application in.

Q. Was it your idea?

A. Yes, I wanted to change.

Q. Nobody was putting any pressure on you to change, were they?

A. No, sir, they wasn't.

Mr. Ardery: That's all.

Cross-examination.

By Mr. Marshall:

Q. Mr. Hurst, where did you get that meter again? I didn't understand that. Up on the hill someplace?

A. I got it at a substation; it's in the city there. It's—I think some power company.

Q. Powell Valley substation?

A. I don't know if it's Powell Valley or which one it was.

[fol. 1022] Q. But you got it in the substation there in Tazewell?

A. Yeah.

Q. How did you know the city service was available?

A. I put an application in for it; they said it would be available.

Q. Who said it would be available?

A. The city, I put an application in, the city, the mayors.

Q. The mayors told you that it would be available if you put an application in?

A. And the city attorneys, yes, sir.
Q. And the city attorneys?
A. Yes, sir.

Mr. Marshall: Thats' all.
Mr. Ardery: That's all, Mr, Hurst.

Witness excused.

PARIS T. COFFEY, a witness called in behalf of the Defendants, after having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Ardery:

Q. State your name.
[fol. 1023] A. Paris T. Coffey.
Q. Where do you live?
A. In Tazewell.
Q. What do you do?
A. Operate a funeral home.
Q. Do you have any other interest in Tazewell aside from the operation of the funeral home?
A. Well, I deal in real estate some.
Q. Do you have any official position with the Chamber of Commerce?
A. President of it.
Q. What is that Chamber of Commerce?
A. Well, it's a civic organization which is organized—the best way I could explain it—to try to help build or do anything we can for the prosperity of our community.
Q. Get industries in?
A. That's right, that's one of our main objects.
Q. Is this a Chamber, Mr. Coffey, for both of the towns in the county, or just one of the towns?
A. It's Claiborne County, and the towns are in the county.
Q. How long have you been president?
A. This is my second year.

Q. Now have you been active in the Chamber since its [fol. 1024] beginning?

A. Yes, sir, since it was organized.

Q. Did the Chamber have anything to do with the institution of the effort to get low cost power in this community?

A. I would like, if it's—Your Honor, that I might explain our Chamber of Commerce position. It will take just a second to do this.

When the TVA came up there, they naturally taken the land, the lower land, which the TVA is a fine thing, but it left our upper land to our community which left our people up there with small farms and a small income, so in our mines, in the eastern part of the county a lot of them closed down so that still left us more or less in a worse position, so as a result of that, Claiborne County, by the Government, was one of the first counties put under distressed area, and we got to seeking some relief for our people, and we had a meeting back sometime ago with the Chamber of Commerce at Morristown getting what they might do. They were getting a lot of industries over there, and the man came over and talked with us as a citizen. That was before the Chamber was formed.

Mr. Marshall: Now wait a minute, are you going to testify about what the Morristown Chamber of Commerce man thinks about this?

[fol. 1025] The Witness: No, this is our organization of our Chamber of Commerce, it's not pertaining to your power, if I may.

Mr. Marshall: I object to what the Morristown Chamber of Commerce man said.

The Witness: Well, anyway, we went ahead and formed a Chamber of Commerce, and we talked about how we could get some relief for our people. We came down to TVA asking about our power for one thing. That's coming down to your point.

We came down there and TVA frankly told us that there was nothing they could do for us except that they had power that we could get the power properly, but we would have to do it ourselves, they had no part in it.

So we went back and as Chamber of Commerce more or

less instigated this whole deal trying to get cheaper power for our community which we could get. We found out we could get cheaper power, and we seeked to get it, and it would be a saving to our people.

By Mr. Ardery:

Q. Did you ever——

A. Actually the point is that I'm making here is this, the point of it is, the high price that we are paying now for [fol. 1026] KU is a block to our growth of our community, and I'm not—by the way, I'll say this from the bottom of my heart to you. I'll say if we don't get cheaper power, the setback of the growth of Claiborne County twenty years or more, we'll never prosper. We've got one factory coming in as a result. We didn't guarantee them, we said we would do all we could to save them power, and it's in your power in my thinking, Your Honor, whether we grow or don't grow. If we have to pay the higher rate with the low income, we won't prosper although we have a fine community. We have beautiful country. I can go fishing in Norris Lake within ten minutes of my house. If you've not been up there, it's more or less a peninsula of the county running down in Norris Lake.

Q. Mr. Coffey, you have some electric service there for your own business establishment. Whose power do you get?

A. KU.

Q. Can you explain what the situation has been there with regard to your own power?

A. Well, I might, to my own power in my home, my funeral home, it's a very high rate. Of course it throws my profit down. To my real estate. I bought, it had REA power on it, and it was my contention when I bought it that with REA power on it that we could still use TVA [fol. 1027] power or the lower rate of power, and I bought it with the understanding and then when they came over, they insisted that I use KU, and I had it out with Mr. Smith back there about the cheek they brought over there and tried to get the franchise, and which we fought to the limit and as a result I have KU on all of my property, but it is detrimental to my profit.

Q. Well now, the real estate you own, KU is on that too, isn't it?

A. KU was on, the first home I built on it, the first three homes I built on it had KU and since this contract, as I understand was run out of January 16, '63, the Powell Valley has erected several poles out there. It's not a change-over; it's just that they have erected several poles, and there's been about fifteen homes built on this property as a result of Powell getting power on it.

Q. Did KU set any poles out there without you asking for it?

A. The condition that existed there, Mr. Ardery, was this. KU and REA both poles were on the property, but TVA—instead of REA, but I call it REA, but TVA was hooked on one building which was the only power on the building when I bought it, but KU did have a pole already on the property, and so did the TVA have their line on the property.

Q. Now, Mr. Coffey, with regard to how these Powell Valley lines came into this community, do you know any- [fol. 1028] thing about any areas in Claiborne County where KU was asked to build and would not build?

A. Yes, sir, I do.

Q. Where?

A. In New Tazewell there's what we call the old highway a-coming from New Tazewell going towards Knoxville. There's—it's a new road now that cuts down, but from New Tazewell down the highway about a mile and a half in the latter part of 1939 or the beginning of 1940, that's when—I can't think of his name now—was with KU over there. He used to be with KU, but anyway, there were about fifteen homes asked to have service from KU, and they refused to service anything that would be feasible. There were petitions signed and taken to KU, but now there are—I'll explain this.

They did have this result. We had a line down there—the Straight Creek Mines came in, and they ran a line to the Straight Creek Mines, and they went by this property, and they did hook on to that, but they had refused to start with. They had asked for it, and couldn't get it.

Q. You were at the meeting where the checks were offered, were you not?

A. Yes, sir, I was.

Q. Will you tell the Court about that?

A. Mr. Smith from and I don't know whether there was [fol. 1029] any other representatives from KU, Your Honor, came over to Tazewell with checks of some, I think, thirty-seven hundred dollars, and of course, it being a Chamber of Commerce a-trying to help out, I felt like that they were something hooked on to these checks that we didn't want. That was a franchise, and we were trying to get cheaper power.

I asked Mr. Smith, who is sitting back there, and he knows this as facts, I asked Mr. Smith if there were any strings attached to the checks, and as I remember, Mr. Smith stated this is a cumulation of the dividend which that you are entitled to get, and I asked Mr. Smith this. I said, Mr. Smith, have you been a-paying this to any of the other towns, and if I'm not mistaken, Mr. Smith told me that had been giving Middlesboro a check for the past three or four years.

And then I asked him, I said, would you give these checks to us without any strings being attached to them, and he—I don't remember exactly his reply about it. I said, we feel this is for a franchise, and he said, no, this is a dividend or something to that effect that we owe it to you, and I insisted, the fact about it, Mr. Smith and I had kind of a strong argument over the check, and I said, if we are due it, Mr. Smith, we are due it without strings. If we are not due it, I don't think you can come over here and buy Tazewell for thirty some hundred dollars. That's the way I feel [fol. 1030] about it. We may be poor, but still we are independent from that angle.

And so he left the checks, and also I'll put it this way, Mr. Smith brought it down to a personal affair, he said, what about your funeral home out there, if somebody wanted to repair something about your funeral home. I said Mr. Smith, if you will put your power down in competition with your competitor, as I have mine with my competitors, well, we'll welcome KU power, and we do. We have nothing against KU, but we do want cheaper power.

Mr. Ardery: That's all.

Cross-examination.

By Mr. Marshall:

Q. You have a competitor there, do you, Mr. Coffey?
A. Have two of them.
Q. Are they funeral homes just like yours?
A. Yes, sir.
Q. They both pay taxes just like you do?
A. Yes, sir.
Q. Do they get any government two per cent money, or do they get money the same place you have to borrow?
A. Well, I don't know that they borrow any. I don't know about their financial affairs.
Q. But your competitors are not subsidized by the gov-
[fol. 1031] ment?
A. I'll say this, if I had a monopoly, if you're speaking of that, I'd rather have a government one as a private one. Either one of them is a monopoly, so I'd rather be the government.
Q. But you didn't answer my question about your competitor being subsidized.
A. So far as I know, they are not. I'll say this for them. My competitors and I get along fairly well.
Q. Do you know how much of the TVA area that's been served by TVA for thirty years is in the distressed Appalachian area according to the President's bill?
A. How much of the TVA did you say? Do you mean Claiborne County?
Q. Do you know that forty-one per cent of the TVA area which TVA has been serving for thirty years is for other reasons still in the distressed Appalachian area?
A. Well, our information from the government, Claiborne County, Campbell County, there were three counties that were listed in that distressed area the first ones, and which I would like to say the government was very generous with us. They gave us a hundred per cent grant up there on our water works, and we also got a sewerage system, a big grant on that to help out in our distressed area. They felt that they—that this condition was big enough
[fol. 1032] that they did do that for us.
Q. I understand that you say you have KU power be-

cause at the time you got the property, I believe it was this agreement was in effect which put your property in the KU service area, is that right?

A. I'm glad you asked me that question, because Mr. Asher here, if I didn't misunderstand him, answered the question for me, and by the way, Mr. Asher, I have all the respect for Mr. Asher. Mr. Asher was asked the question up here day before yesterday afternoon as a result—he called it the Norgecraft plant, it's the Teacraft Plant. I helped to build it, and over this property up here, we had the argument. He said as a result of that argument, they drew up some maps, and clarified—tried to clarify the lines. Mr. Rowe told me when we were talking about out there——

Mr. Marshall: Wait a minute. I object to what Mr. Rowe told you.

The Court: Is he the KU man?

Mr. Marshall: He's an ex-Powell Valley manager, former Powell Valley——

Mr. Ardery: He was a witness called by Kentucky Utilities Company, if Your Honor please.

Mr. Marshall: That's right, but I don't think that necessarily——

The Court: You think Mr. Ardery, do you think what he [fol. 1033] told him would be competent?

Mr. Ardery: I doubt it, if Your Honor please.

The Court: So does the Court.

By Mr. Marshall:

Q. When did you buy this property that we are talking about?

A. I believe it was in '59, maybe. I can't tell you the exact date.

Q. Well, I was just trying to get straight your earlier testimony that the reason you have KU is because at that time this agreement was in effect, and——

A. Well, I was answering your question from this—I'll answer your question this way. From what I knew, what I had been told——

Mr. Marshall: Wait a minute, this is just——

Mr. Ardery: This is what he had been——

Mr. Marshall: This is just what he had been told.

Mr. Ardery: You can't hold him to interpret a contract from what somebody has told him. I think he can tell what he was given.

Mr. Marshall: By whom?

The Witness: I'll give you my honest answer.

By Mr. Marshall:

Q. What you really want to tell me is what Mr. Rowe [fol. 1034] told you in another form.

A. I want to tell you that I understood and what Mr. Asher said up here on the witness stand.

To my knowledge, he said they was already in effect, and he said as a result of the argument that the maps were drawn, but at that time, I was told that the maps had been drawn before that, and he said as a result of the argument, they drew the maps, and if they didn't have——

Q. I think this whole testimony results from a misunderstanding.

Mr. Asher testified that the maps were drawn just like you understood beforehand, and used to—you understood it correctly. The maps were in existence when you bought the property, and they were used by KU and Powell Valley, to resolve questions.

A. Mr. Asher stated as a result of that argument, they drew the map.

Q. No point in you and I arguing about it.

A. It was the only point I had. I was glad I found out about it.

Mr. Marshall: I believe that's all.

The Court: Anything else?

Mr. Ardery: Yes, one other question.

Redirect examination.

By Mr. Ardery:

[fol. 1035] Q. Mr. Coffey, you, because of your investment in real estate, do have some acquaintance with land values in that community, do you not?

A. I think so.

Q. Would you make a comparison to the Court of lots which in all other respects are equal, but one of them has Powell Valley service or city service, and the other has KU service?

A. The best way I can answer that would be this property was cut up and sold and since some of the lots brought one hundred fifty, some three hundred, some a little less, but since they got the cheaper power on that property out there, it's almost doubled in value, and people are grabbing the lots since they got the power. Before then it just wasn't as valuable. I'd say it increased the value of land something a third by having the cheaper power in our community.

Mr. Ardery: That's all.
Mr. Marshall: Wait just a minute.
That's all.
Mr. Ardery: Thank you, Mr. Coffey.

Witness excused.

Mr. Ardery: Mr. Miner.
If Your Honor please, Mr. Miner's deposition was read [fol. 1036] in part, and if we can agree that the entire deposition can be made a part of the record here, it will obviate the necessity of asking him a great many questions that were answered in that deposition.
Mr. Rowntree: That's agreeable, Your Honor.
The Court: All right.

Ralph B. Miner, a witness called by and in behalf of the Defendants, after having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Ardery:

Q. Just state again who you are, where you are from, and what you do?

A. I'm Ralph Miner, from Jonesville, Virginia, and I'm the manager of Powell Valley Electric Cooperative.

Q. How long have you been manager of Powell Valley?
A. Since about the first of May, 1962.

Q. Mr. Miner, you heard a lot of testimony by the Plaintiff's witnesses with respect to a tri-party agreement between TVA, Powell Valley and KU, a letter agreement which they say was perhaps a part of that agreement or at least related closely to it, and then a later agreement in 1958.

[fol. 1037] Since shortly before you became manager and through and up to the lawsuit brought here, will you state the circumstances as you understood them relative to any agreements that were in effect respecting the allocation of territory or the division of customers or agreements that neither party would serve the other party's service area?

A. Well, immediately before I became manager, I knew very little about it. I knew we had some agreement and at that time I was informed that we were to serve the person who was nearest our line. Then I do know that maps were drawn by Mr. Rowe and some representative of KU sometime before I became manager.

Now after I became manager, I saw, I believe, a letter of transmittal and the maps rolled up lying in the office where the maps had been offered to Powell Valley for approval and of course I read, eventually read the 1958 agreement.

Q. About the maps, did the Board—were the maps ever called to the attention of the Board of Directors of Powell Valley?

A. I don't know that they were.

Q. Can you say whether or not the Board ever approved those maps?

A. They didn't approve them.

Mr. Rowntree: If Your Honor please, we object to that. [fol. 1038] The best evidence would be the record. If there is an actual disapproval, that is the best evidence.

By Mr. Ardery:

Q. Well, since you have been manager, have you attended all of the meetings of the Board of Directors?

A. Yes, sir.

Mr. Ardery: I think I'd like to ask the question, since he's been manager, having attended all of the meetings of the Board, if the Board ever approved those maps.

The Court: In his presence?
Mr. Ardery: Yes, sir.
The Witness: No, sir.

By Mr. Ardery:

Q. Now tell about the 1958 agreement and what happened to it.

A. Well, the 1958 agreement, I think the best I could describe it, just simply provided that whosever facilities were nearer the new load would serve that particular load, and that neither side would take the customers of the other party, existing customers of the other party.

Q. And did it provide any means of termination, or did it—what happened about it?

A. Yes, sir, it provided a means of termination.

[fol. 1039] Q. Tell the Court about that.

A. Well, after I became manager, considerable pressure was put on me by the people in this area for service from time to time, and I realized that this agreement was the only thing that kept our cooperative from serving anybody as far as I could tell, and these people wanted service from Powell Valley.

Now I asked the advice of the attorney of the cooperative. He gave me the opinion that this agreement could be cancelled and that not only could it be cancelled, he felt it should be cancelled, because in his opinion, it could be held as being in restraint of trade, and that we should cancel it.

[fol. 1040] Q. You gave notice of cancellation?

A. And we gave notice of cancellation.

Q. And that cancellation, I believe, according to your understanding, was effective in January of 1963?

A. January, 1963, yes, sir.

Q. And since that time and up to the time of the institution of the lawsuit has Kentucky Utilities by letter, by telephone call or by any communication attempted to deny that you had successfully terminated that contract?

A. No, sir. As far as I know they never indicated that it was not effective terminated.

Q. Up to the commencement of this lawsuit?

A. Up to the commencement of the lawsuit.

Q. And since that termination and up to the commence-

ment of this lawsuit has Kentucky Utilities Company by any means, letter or verbal communication or otherwise, indicated that there was any restraint on you by any contractual arrangement whether it be by the 1958 arrangement or the 1952 arrangement that would prevent you from serving anyone within your general service area?

A. I don't think so.

Q. And did you receive a copy of a letter which the president of Kentucky Utilities Company wrote to Mr. Norman Clapp, Administrator, Rural Electrification Administration, on March 10, 1964?

[fol. 1041] A. Yes, sir, I did.

Q. Will you read to the court the second and third paragraphs, a brief part of that letter?

The Court: That is the letter from whom?

Mr. Ardery: Mr. Floyd Fairman, who was the president of Kentucky Utilities Company, or chairman of the board—Look at the end of the letter there and see how he calls himself.

The Witness: He was president.

Mr. Ardery: All right.

The Court: And the letter is dated when?

The Witness: The letter is dated March 10, 1964.

The Court: Fairman. You say he is the president?

The Witness: F. I. Fairman, president of Kentucky Utilities.

A. (Continuing) To Mr. Norman Clapp, Administrator, Rural Electrification Administration. This is the second and third paragraphs on page 2.

Q. The second and third paragraphs on page 2.

A. Okay.

"Powell Valley Electric Cooperative is a distributor of Tennessee Valley Authority power. As Powell Valley Coop extended its service into Claiborne County, various con-
[fol. 1042] flicts about service to new loads developed, to the extent that in late 1956 and early 1957 our Company was led to enlist the help of your office in achieving a workable arrangement to prevent territorial and customer disputes between the two utilities. Your files will contain considerable correspondence and maps concerning such con-

flicts during that general period of time. Largely through the efforts of Mr. Ralph Foreman, then in the REA office in Washington, on January 8, 1958, an Agreement was entered into between Kentucky Utilities Company and Powell Valley Electric Cooperative which Agreement generally provided that neither should raid the customers of the other and that new loads would be served by the utility whose facilities were closest to the load. A copy of the Agreement of January 8, 1958 is attached.

"By letter dated October 16, 1962, Powell Valley terminated the thoroughly sensible and equitable 1958 Agreement, a copy of Powell Valley's 1962 letter also being attached."

Mr. Ardery: We would like that this be marked as an exhibit.

(Exhibit No. 104 was filed.)

By Mr. Ardery:

Q. The rest of that letter is just largely a harangue by the president of KU against Powell Valley, is it not, to [fol. 1043] the Administrator?

A. Yes, sir.

Q. Now do you have a map here showing the growth of Powell Valley?

A. Yes, sir, we do.

Q. Is this it right here?

A. This is it right here.

Mr. Ardery: I will ask it be given the next marking.

(Exhibit No. 105 was filed.)

By Mr. Ardery:

Q. Tell the Court what this map represents?

A. Well, the basic map is the same map that has been exhibits here. This map was made on one of these same maps that has been exhibited here with lines and customers of Powell Valley and LaFollette, and then I believe——

Q. From the TVA exhibit?

A. From TVA exhibits; yes, sir. And then we took our old project maps of different projects which we had built

in Tennessee and colored sections in here as near as we could comparing the two maps to show the development of the cooperative by different projects into this area.

Q. When you say different projects you mean different specific construction projects?

A. Yes, sir. We had them labelled back at that time B [fol. 1044] Project—there was one project there that was built under the War Production Board—and C Project and D Project and a P Project.

Q. How did those projects—how are those projects displayed with regard to colors?

A. Well, the yellow was the earliest Tennessee project, the B Project. And that is, you can see the yellow beginning right up at Hancock and Claiborne where the two words are, Mr. Ardery, right where the words are there, yellow colored; right at the end where it says "Claiborne" again is the B Project built somewhere around 1941——

The Court: What do you mean by "project"?

The Witness: Well, a project in rural electric cooperatives is a group of people that have applied for service and you just stop off that application at one point and say this is going to be a project and make up your work orders and proceed from there.

By Mr. Ardery:

Q. Step down to show the Court what you are talking about a little better.

A. (Going to map on stand.) Well, this is the yellow. This is the 1941 project down to this point, and there are some extensions running up here, up here, and here, and I believe there might be one little neck right here in Clai- [fol. 1045] borne County.

Then during the war, on War Projection Board approvel, there was a little section of line built right in here. I think it ends possibly right there with a short extension up here. The construction, of course, did not amount to much during the war, just this little section.

Immediately after the war in 1945, I went back in the minutes of our board meetings and got some of the dates these projects were approved. The C Project, which is the red color here that you see in various places around this

map, was approved June 8, 1945, and it was built somewhere in 1945-46. And in April 1946 our manager reported to the members of the cooperative that in the past year we had built 400 miles of lines. So I am not sure exactly when these lines were built but this one was approved June 8, 1945.

Then on November 15, 1945 the Board approved the D Project, which is the green colors here, and you see the various different places filling in there.

The P Project was approved in August 1945, was built probably in 1946-47, the black. You can see the black extensions throughout this map.

Then we took an orange color. This map included all of our lines, as far as we know, on July 1, 1957 and we col-
[fol. 1046] ored in orange all service extensions, taps, and so forth, that were built between 1948 and 1957.

This is the Tazewell and New Tazewell right here.

Q. Mr. Miner, was KU serving in this territory all that time?

A. Well, they may have been serving under Dixie Power & Light Company at one time or another, but KU or Dixie Power & Light served in here all this time.

Q. How can you explain the growth of these lines if there was present in the area all this time another electric service?

A. Well, of course, the only way I can explain it that they just did not go out and serve the people, that is my personal opinion.

Q. Of course, you realize that Powell Valley is being charged with conspiracy in this case to take away the customers of Kentucky Utilities Company. Will you tell the Court what the moving force was that brought this case into court, and explain why you say that?

A. Well, I think the moving force that brought this case into court is the people themselves through their elected officials and through any means that they had at their disposal to bring pressure. They felt that they were being discriminated against and rightfully so, I think.

[fol. 1047] Q. Would you have been happy to live with a strict allocation of territory, an allocation of customers agreement with KU?

A. No, sir.

Q. Would your life have been easier that way or not?

A. Well, I must have misunderstood your question. I thought you meant as a person living in Tazewell.

As manager of Powell Valley Electric Cooperative it would have been far easier for me to live with the territorial agreement with KU because I wouldn't have as many problems as I have probably, if I lived with this agreement.

Q. Did you feel that whichever way you went you were going to wind up in court?

A. Yes, sir.

Q. What led you to feel that way?

A. Well, from time to time people had in a roundabout way threatened to sue us, and as I said a while ago, our attorney felt we might not be in too good a position in this situation.

Q. To refuse service to the public?

A. To refuse to serve these people.

Q. Were there instances where even during the time that there was an agreement in effect betwen you and KU where the sheer insistence of the power user prevailed over that [fol. 1048] agreement?

A. Yes. I think there was one claim in the case. Mr. Asher referred to the Breeding case here.

The Court: Which one was that?

Mr. Ardery: The Breeding case.

A. (Continuing) The Breeding case, your Honor. The Breeding people applied to us for service. This is Frank and Kate Breeding, a husband and wife. And according to the terms of the 1958 agreement we could not serve them and we so advised them.

Mrs. Breeding, she is a very determined woman and she brought a good deal of pressure on me, and I called Mr. Asher and he went down and talked to her, and she went to the extent of getting an attorney and the attorney appealed to the Public Service Commission. And I don't know the details of all that he did but I do know that Mr. Asher came to me and said that he would like to trade this one, there was so much pressure being brought he would like to get rid of this particular one, but I did not trade.

I told him if we traded this one we would just have

another unhappy situation somewhere and we would not trade.

We did serve the Breeding home, as he testified, after we had cancelled the 1958 agreement, but he was willing—he was willing to turn that one loose regardless of agree-
[fol. 1049] ment or no agreement.

Q. Did she go to the Public Service Commission?

A. Yes, she did.

Q. With her attorney?

A. Through her attorney; yes, sir.

Q. Subsequent to the notice of termination of the 1958 agreement that you gave Kentucky Utilities Company was there a delegation of representative of KU Company who paid a call on the Board of Directors of Powell Valley at Jonesville?

A. Yes, sir, there was.

Q. Will you tell the Court the approximate time of that meeting and what transpired?

A. Well, I don't have the date. I believe it was in June 1963 that they came to the board meeting.

Q. What happened, and if you recall what representatives of KU were there?

A. Well, of course, I can't give you the names. Mr. Asher was there, Milton Lewis was there I am pretty sure, and an attorney.

Q. Was Mr. Skinner there?

A. Mr. Skinner was there. They first, I believe, reviewed to the Board of Directors the history of our cooperative, the fact that they had supplied the power to us in the beginning, and that we had had some troubles up until the [fol. 1050] 1958 agreement had been signed, and that since we had cancelled that—in between that we got along pretty well and since we had cancelled the agreement they thought we would probably have trouble again, they would like for us to sign a new agreement.

Q. Did they make any threats?

A. Veiled theats, I would say.

Q. To go to Congress about it?

A. To the effect that if you boys don't calm down here a little bit we will go to Congress and bring as much pressure on you as we can.

Q. They threatened pressure on you through the REA?

A. Through the REA.

Q. As to your loan funds?

A. Well, of course that is the purpose.

Q. Now there have been the minutes of a number of meetings read here by plaintiff witnesses, and I believe most of those minutes were not read in toto. Can you say whether or not in practically all of those meetings and in most of the minutes that were partially read there were indications made by TVA and Powell Valley that the moving force behind any effort to get TVA power into this area had to be initiated by the people themselves?

A. I think so. I think this was clear from the beginning, that the people would have to initiate any action that was [fol. 1051] taken.

Q. Were any of these meetings either held or any of them done in any clandestine manner or any effort to hide or keep under cover the thought that was going on?

A. No, sir, I don't think they were. A good many of them got in some—some of the things got into the paper.

Q. Didn't you have a whole bushel basket full of newspaper clippings?

A. We had several things that some of the meetings that I attended in Tazewell made the paper, were published in the paper.

Q. What paper would that be published in?

A. Be the Middlesboro Daily News and the Claiborne Progress, and possibly the Hancock County-Union County Times.

Q. Was this whole story sidely publicized in the city elections in Tazewell and New Tazewell?

A. I understand it was.

Q. Was there any effort made on anybody's part, that is from the standpoint of the people of Powell Valley or the TVA, the city systems, to conceal anything that they were doing in an effort to get cheap power?

A. Not that I know of.

Q. The unabridge Webster dictionary, Mr. Miner, defines [fol. 1052] a conspiracy as an agreement manifesting itself in words or deeds by which two or more persons confederate to do an unlawful act or to use unlawful means to do

an act which is lawful; a combination of men having an evil purpose or a plot.

Now have you been guilty of any of those things, elements here, which are definitions of a conspiracy on behalf of Powell Valley?

A. I don't think so; no, sir.

Q. Has any representative of the city systems or TVA to your knowledge acted in any way which would make them conspirators under such a definition?

A. No, sir.

Mr. Ardery; That is all.

Mr. Rowntree: We would like to introduce as Exhibit No. 106 a late filed exhibit to the deposition of Mr. Miner, covering Exhibits 2 and 3 to that deposition, to complete the record for that whole deposition.

(Exhibit No. 106 was filed.)

Mr. Ardery: There is one more thing, if I may. May I please ask——

The Court: You may, but let's get this. What is 106?

Mr. Rowntree: That is the only exhibit that has not been [fol. 1053] filed to Mr. Miner's deposition.

The Court: And what is it, Mr. Rowntree?

Mr. Rowntree: It is an estimate of the amount of power that was sent outside of Claiborne County to other counties in Tennessee from the Tazewell sub-station.

The Court: Should the Court know about it? If so, read it to me right now and then we will hear from Mr. Ardery.

Mr. Rowntree: It is mostly for purpose of other exhibits which have been introduced.

The Court: All right. Mr. Ardery?

Mr. Ardery: I beg your pardon, your Honor, I did omit one other exhibit which I think a couple of questions will suffice to cover.

Will you mark this, please, sir.

By Mr. Ardery:

Q. This is 107. Mr. Miner, will you tell the Court what this exhibit is?

A. That is a chart that we had prepared comparing the dollar and cent amounts for different amounts of kilowatt

hours on the rate of Powell Valley Electric Cooperative and the rate that was filed with the Tennessee Public Service Commission by Kentucky Utilities that was in effect in [fol. 1054] October, 1963, as far as we could tell.

Mr. Marshall: If the Court please, we object to the introduction of this exhibit and testimony on several grounds.

We did refrain from objecting to the introduction of the three witnesses from Tazewell and New Tazewell who told of their want for the TVA power. At this time this objection goes to all of that testimony too, and in our view of this litigation a comparison of TVA rates to Powell Valley to KU rates, comparison of the subsidized power rates with the tax paying power rate is not a competent or relevant issue in the case.

The TVA statute says that the TVA will stop at whatever point the statute says and no question that their rates are low.

This line of testimony can go only as far afield as the Court would let it go in answer as to why the rates are lower or the things that go in making up a rate.

This particular exhibit, as I have understood it in glancing at it and from what KU people tell me, does not take into comparison a number of factors in these rates as far as they go but if we concede the TVA rates are low where are we? It is not settled.

[fol. 1055] Mr. Ardery: I think this goes not to the question which I think you have indicated perhaps as the major one in the case of what is the TVA service area under the 1959 Act. This goes to the part of the case that has to do with who was the moving party—was there a conspiracy to rob KU of its customers or was it for some reason why the people made an irresistable force.

The Court: I am presently of the opinion that it is competent for whatever bearing it may have on the conspiracy charge. And the Court, gentlemen, of course, is going to hear all sides fully but the Court is still of the opinion that the controlling point in this lawsuit is the area in which the Congress in this 1959 Act—I am going to hear counsel on all the points made with an open mind, but I am still of the opinion just as strongly of that opinion as I was as I indicated to Mr. McCarthy yesterday, but I think so long

as this conspiracy is in this case I have to listen to this kind of testimony.

Frankly, without deciding, if the KU expects to get along with this lawsuit on this conspiracy charge, I think KU has the laboring oar. I want to be frank with all counsel so [fol. 1056] you can argue. If counsel convinces the Court it is wrong on any of these points, the Court will quickly change, but I want you to know—I want to think out loud with you all on it, and I overrule the objection and let this testimony go in for whatever bearing it may have on the charge of conspiracy.

(Exhibit No. 107 was filed.)

By Mr. Ardery:

Q. Briefly, Mr. Miner, continue.

A. Well, as I said, that is a comparison of Powell Valley Electric Cooperative dollar and cent amounts for certain blocks of kilowatt hours versus Kentucky Utilities for certain blocks of kilowatt hours. I realize there could be some variations. They have some things in their rates that would make it practically impossible to forecast how much it would be on one particular rate, the water heater rate and off-peak rate, but for purposes of this chart we have included in the 800 kilowatt hours and up, 300 kilowatt hours of off-peak energy that we figures would cover a water heater.

Now the rates that we have, the rates that we used in computing this, we obtained from the Tennessee Commission and this is rate RS-3 for residential service. And as far as I know this is the rate that was in effect last fall [fol. 1057] when this started last October, you can see, your Honor, the kilowatt hour amounts across the bottom but you will be unable to read the dollar and cents amounts.

If you will like I will step down and read those for you.

This is 50 kilowatt hours of Powell Valley rates. On Powell Valley's system we have a minimum of 50 kilowatt hours per month, and that is $2.50. With Kentucky Utilities Company that is $2.53. Very little difference.

At 150 kilowatt hours on Powell Valley it would be $5.50 against $5.53.

The Court: What is the average kilowatt hours a modern residence will use, Mr. Miner, in that area?

The Witness: You consider a modern residence to have electric heat. That is—well, I have here, we have a special route of accounts who have electric heat and we have in this 608 accounts.

Now of the 608 accounts, 51.15 per cent use 3800 and over at least one month. Now usually you have one cold month and that tapers a little each way but at least one month out of the winter heating season 51.15 per cent use 3800 kilowatt hours or over during one month, and right there is 3800 kilowatt hours.

The 3800 Powell Valley rates would be $30.50, and the [fol. 1058] rate the way we have computed it here on KU rates would be $75.53.

[fol. 1059] Now we have in this 608, we have 164 members who use 4800 kilowatt hours or over or 26.97 per cent would use 4800 or more at least one month during the winter heating season, and this is the 4800 kilowatt hour bracket and that's $38.00 on Powell Valley, $95.53 on KU rates. Will that be sufficient?

The Court: Yes, sir.

By Mr. Ardery:

Q. How many new houses going in on your service are electrically heated homes?

A. Well, by far the majority of them. I'd say seventy-five per cent.

Q. Of the new houses?

A. Of the new homes being built today are electrically heated. This is a big factor in the home building industry apparently.

Mr. Ardery: That's all.

Cross-Examination.

By Mr. Rowntree:

Q. Is the basic figure for the Kentucky Utilities rate on that chart, Exhibit 107, does that include the heating rate of Kentucky Utilities?

A. Well, if they had a heating rate filed at this time, I couldn't get a hold of it, Mr. Rowntree.

Q. In other words, it does not include the Kentucky [fol. 1060] Utilities heating rate?

A. This includes the only rate I could find they had filed at this time, I'll answer your question that way.

Q. What time was that?

A. Well, this—we did this on the comparison of the rates that were filed last October.

Q. Last October?

A. Yes, sir.

Q. 1963?

A. 1963. If it will help you any KU did file a new rate in—became effective June the 1st, 1964. This is not reflected here.

Q. Have you made any effort to adjust this chart here to take account of that?

A. I have here before me a column of figures showing what each one of these amounts would be under the rate filed which became effective June the 1st, 1964.

Q. Have you set forth that result in a chart form that's visual to the Court?

Mr. Ardery: Excuse me. If the Court please, as indicated, the purpose of this chart was to show the motive of the people in taking the lead.

Now we are not trying to make a comparison of the rates in every respect as of this moment. We think that the basic factors of this case took place some months back. The suit [fols. 1061-1062] was filed in October.

Mr. Rowntree: With that explanation, we will go on, Your Honor.

By Mr. Rowntree:

Q. Now, Mr. Miner, it's true that a cooperative cannot survive under a TVA rate, basic rate, isn't that true?

A. No, sir.

The Court: What was that last question? Read that please.

(The last question was read by the reporter.)

By Mr. Rowntree:

Q. That is not true?

A. That is not true.

Q. All right, just a moment.

Question—this is your deposition.

"Q. Can the cooperatives operate without losing money at the TVA rate?

"A. No, sir, not at this standard rate. That's the reason the amortization charge has been added."

Now do you mean to say that the amortization charge is what keeps the cooperative from going under?

A. No, sir. In the question you just asked me, you asked if a cooperative could exist. Now several do that • • •

• • • • • • •

[fol. 1063] By Mr. Rowntree:

Q. Talking about those that you have taken from—we'll talk about the customers that you would take from KU.

A. Talk about the people who are now receiving service from Kentucky Utilities?

Q. Right.

A. I have no idea what their consumption is.

Q. You can't tell what the effect would be on a great number of residential customers of KU, if Powell Valley takes over the service?

A. I have no way of knowing what their use is, what their consumption is.

Q. Do you know how many customers, residential customers, what percentage of KU's residential customers in

Tazewell and New Tazewell would be helped by having Powell Valley take over the service?

A. Mr. Rowntree——

Q. Have you made a study?

A. Mr. Rowntree, I only know what the people have told me.

Q. Do you know of any of those people who have told you who have made a study?

A. Well, I know—I heard the testimony of some of the people here.

[fol. 1064] Q. And you heard the testimony that none of them had made a study, is that not true?

A. As far as I know, no one has made a study.

Q. Did you hear the testimony of Mayor Hardin that he had not made a study?

A. I don't recall what Mayor Hardin said, but to my knowledge, nobody has made a detailed study.

Q. Now after this power load on a particular customer goes up to a certain point, then there's no more amortization charge, isn't that true?

A. Amortization charge ends at 150 kilowatts, I believe, kilowatt hours.

Q. And it becomes increasingly cheaper thereafter in rapid progression on your rates?

A. This is to encourage the use of electricity.

Q. And you start off with a low rate from TVA, isn't this true? I mean your generating facility, TVA, has tremendous advantages over private power companies?

A. It's a very efficient organization.

Q. It pays cheap amounts for its coal, doesn't it?

A. I know nothing about the dealings with coal.

Q. The people in Claiborne County used to know something about coal, didn't they?

A. I know nothing about the coal business in Claiborne [fol. 1065] County.

Q. Because there's none left in Claiborne County, isn't that true.

A. Really, I don't know.

Q. Now, Mr. Miner, the gentlemen who have testified here for the cities, Mr. Hurst, Mr. Coffey, Mr. Brooks, these are the gentlemen who have been largely responsible for the effort to take over—for Powell Valley to take over

the KU service, is that true? Have these not been the core of the group that have fostered this?

A. I don't think you could say that at all.

Q. Wasn't Mr. Coffey at some of these meetings?

A. Mr. Coffey has been at several.

Q. Didn't this thing start with the Chamber of Commerce?

A. I understand that it did.

Q. And weren't these men very active in the Chamber of Commerce when this started?

A. Yes, sir, but the Chamber of Commerce generally represents the people in general as I understand it.

Q. Don't they represent the business people?

A. Sure.

Q. Generally?

A. Generally.

Q. Do they represent by and large the smaller home [fol. 1066] owners, the residential owners of Tazewell and New Tazewell?

A. Well, knowing these gentlemen, I'd say they represent the best interest of every person in Claiborne County to the best of their ability.

Q. And particularly their own position as users of large amounts of power?

A. I would suppose so.

Q. Now you say that you have been afraid or threatened with lawsuits by people who wanted cheaper power. Do you recall that on November the 15th, after several meetings with such gentlemen as these and with TVA officials that you and some TVA officials met together on November the 15th, 1962?

A. Well, of course I recall meetings, if you say that's the date we met——

Q. And this was after you had a request from somebody for a meeting, do you recall that you and the TVA officials met alone before this meeting that was requested?

A. Yes, sir.

Q. And do you recall that in the absence of the towns or any of these other people, you and the TVA officials decided that the towns should adopt a resolution and I quote from Exhibit 62, quote:

"The two towns should adopt a resolution as follows:

[fol. 1067] "They want cheaper power;

"The cooperative has this cheaper power;

"They demand that the cooperative serve them either by buying out KU or duplicating their system."

A. I think I recall that, yes, sir.

Q. Now, do you think that a person who is afraid of lawsuits because people are demanding to have him serve them would draw up a resolution like that and put it in the potential customers' hands?

A. Well, I'd rather be sued when I'm right than to be sued when I'm wrong.

Mr. Rowntree: I would too.

The Court: Who's going to decide who's right and who's wrong.

By Mr. Rowntree:

Q. Now the co-op itself, after drawing cheap TVA power, has certain advantages over the distributor side of the private utility doesn't it?

A. In what way, sir?

Q. Taxes?

A. Well, I don't know what they do, really.

Q. Well, for one thing, you went over to Nashville and got hold of a sales tax exemption, isn't that right?

A. That's true.

[fol. 1068] Q. Also you pay very little property taxes in Claiborne County?

A. Well, I think that is a special privilege because of the rural and the rough terrain that cooperatives serve compared to the dense areas served by the private utilities.

Q. Well, don't you know that Kentucky Utilities is the biggest taxpayer in Claiborne County?

A. I saw that in the paper.

Q. Yes, sir. And Powell Valley pays very little taxes in Claiborne County?

A. The comparsion of taxes, KU pays quite a bit more than Powell Valley in Claiborne County.

Q. And don't you think they ought to be pretty much on an equal basis in accordance with the property values that have been put in this record?

A. I'd say if you will let the cooperatives serve the dense area as well as the utilities, we will be happy to pay the taxes.

Q. Are you advised that Kentucky Utilities pays eleven million dollars in income taxes a year?

A. I don't know about their income taxes, sir.

Q. Do you pay any income taxes?

A. No, but neither would they if they operate non-profit.

[fol. 1069] Q. Well, somebody has got to make the money to pay those taxes, don't they?

A. Well, you wonder if there's that much difference in taxes.

Q. And where is the benefit of that going? Is it to the small user of electricity or is it to the big user of electricity?

A. Well, this is designed to make the small user of electricity a big user of electricity, and make his living standard better.

Q. Well, I think I could afford it, but I don't have electric heat.

Is this—are you saying that the increase in electric consumption by heating houses with electricity, that is necessary to the progress of the area, is that generally what you say?

A. No, I say this improves the living standard of people, the increased use of electricity and the living standard go hand in hand.

Q. One thing I would like to clear up, Mr. Miner, is the rates that's charged the cities by Powell Valley. I don't think we have cleared it up yet.

I believe Mr. Wessenauer testified, if you will recall, that Powell Valley charges Tazewell and New Tazewell a BG rate, is that correct?

[fol. 1070] A. Well, I'm not sure. BG rate, I believe, is the commercial rate, and of course I think that is the rate that's charged the commercial users plus some other things that I would like to explain if I may.

I told you at our office that this was quite an accounting process. I have some notes here, if you would like——

Q. Isn't the BG rate a pretty simple computation on the face of the contract?

A. Well, as far as the billing to the customers, but the way we are handling it for the towns, it's rather complex.

Q. Do you have more than one metering place?

A. Each one is metered individually.

Q. Each customer of the towns is metered separately?

A. Separately.

Q. There are twenty-four metering points in the town, is that right?

A. I don't know the number, sir.

Q. Now I think Mr. Wessenauer testified this morning that Powell Valley does not have—well, the contract on its face would prohibit Powell Valley selling power to the towns for resale to the customers of the towns, do you recall that?

[fol. 1071] A. I think so, yes, sir.

Q. What has been done about that contract prohibition between Tazewell, New Tazewell and these other people we have charged with being conspirators?

A. Well, as I understand it, that contract provision is——

Q. Have you even thought about it?

A. Yes, sir, we have thought about it. That contract provision is to prevent the people from being charged too much for energy, not to prevent them from getting cheaper rates, and there's no violation here that we know of.

Q. Do you take the position, as Mr. Wessenauer does, that the TVA rates are subject to change from town to town, from cooperative to cooperative?

A. I take the position that this is the arrangement we made with the towns. As far as I know it's legal, and this is the way it's being done.

Q. Have you talked to TVA about this point?

A. Yes, sir, we have discussed it.

Q. Who did you talk to?

A. Talked to Mr. Button, I believe.

Q. Did you talk to Mr. Wessenauer?

A. Mr. Wessenauer and I have never talked about it, to my knowledge, until——

Q. And what did Mr. Button tell you about this point?

[fol. 1072] A. Well, we discussed the thing, and the fact that this was a little unusual, but the people were getting

the benefit of the rate—in other words, they were not being charged any more than were members of the cooperative, and that due to this, this provision could be waived until the total arrangement could be worked out.

Q. And that would be after this lawsuit?

A. Yes, sir.

The Court: I'm behind again.

You brought that out this morning. What is the provision in the contract? I don't understand.

Mr. Rowntree: The provision in the contract provides that Powell Valley will not take the power from TVA and sell it to Tazewell and New Tazewell, for resale to its customers. Of course that's exactly what's been going on. I've been trying to find out what took place. Is there really a Tazewell and a——

The Court: You mean the contract contemplates that the co-op would sell direct to the customers, the retail customers?

Mr. Rowntree: And that's all, it won't be resold to somebody else.

The Court: All right.

[fol. 1073] Mr. Rowntree: And we say that that certainly shows there's no Tazewell and New Tazewell system here. They don't have any such system existing.

The Court: Is that all, Mr. Rowntree?

Mr. Rowntree: Yes, sir.

The Court: Anything else?

Mr. Ardery: No further questions, if Your Honor please.

The Court: Take a short recess.

(Whereupon a short recess was taken.)

The Court: Gentlemen you may continue.

Mr. Ardery: Mayor James B. DeBusk.

JAMES B. DEBUSK, a witness called by and in behalf of the Defendants, after having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Ardery:

Q. State your name, please.
A. James B. DeBusk.
Q. Where do you live?
A. New Tazewell.
Q. What do you do?
A. My occupation?
[fol. 1074] Q. Yes.
A. Florist.
Q. Florist?
A. Florist business.
Q. And are you the mayor of New Tazewell?
A. Yes, sir.
Q. When were you elected?
A. I was elected in 1959, took office in '60.
Q. This is your first term, is that —
A. Second term.
Q. Second term?
A. Two year term.
Q. Was there an election in New Tazewell this year for some of the members of the Board of Aldermen?
A. Yes, sir.
Q. How many members were elected this year?
A. Three.
Q. Did this effort to get a city municipal system, did it become an issue in the election?
A. Well, to a certain extent, yes, sir.
Q. Did you have candidates who were endorsing the municipal system on the one side and candidates who were against it on the other?
A. We didn't have as many as the other town, Mr. Ardery.
[fol. 1075] Q. You didn't have as many in New Tazewell as there were in Tazewell?
A. That's right.

Q. Were any of the aldermen who were elected in New Tazewell supporting KU?

A. Not to my ability.

Q. Is your answer no?

A. No, sir.

Q. Now you heard the question that Mr. Rowntree asked Mr. Miner about whether this arrangement was—or the attitude of the Chamber of Commerce was to benefit the large power users rather than the small power users.

Were you given a lot of trouble by people who wanted lower cost power in your town?

A. Yes, sir. Mr. Miner, in the past four years since I've been the mayor, we have been awfully disturbed with people in the New Tazewell area wanting cheaper power. We have some customers that live on one side of the street that has one power, and some on the other and they have been comparing bills, and they are dissatisfied. We have some dissatisfied customers.

Now I notice it was stated that it was the larger customers, but I can truly say that we have had as many complaints from the smaller users as we have the larger ones.

[fol. 1076] Q. And altogether you have had many or few complaints?

A. We had many complaints, many complaints.

Q. There's been some testimony here about a new industry locating in New Tazewell. Tell us about that.

A. Yes, we have a new interest that is coming into New Tazewell, and they are going to employ about six hundred people.

Mr. Marshall: I object to his telling what the new industry people have told him. This is hearsay as far as he is concerned.

The Court: Yes, I think it would be. He can't tell what somebody told him.

By Mr. Ardery:

Q. Is that plant now under construction?

A. Yes, sir.

Q. Who is providing the service to the plant while it's under construction?

A. TVA power, Powell Valley.

Q. Have you worked with the Chamber of Commerce, Mayor DeBusk?

A. Yes, sir.

Q. Do you know some of the circumstances under which this plant was obtained for your community?

[fol. 1077] A. It was obtained at one point specifically. It was under labor, low labor cost that we have in the county, and then under cheap facilities for power. They want to be located in that vicinity.

Q. Now I read you a document here dated October 21, 1963, it bears the signatures, James B. DeBusk, and it says:

"The Commissioners for Town of New Tazewell——"

Mr. Marshall: Could we see it before you read it?

Mr. Ardery: Yes. This is an extract from the minutes. I just want to put it in as an exhibit.

Mr. Ardery: "The Commissioners for Town of New Tazewell, Tennessee, met in Special session at Tazewell Florist Shop, New Tazewell Tenn 8:15 PM

"Meeting called to order by Mayor James Billie DeBusk

"Present
"James Billie DeBusk, Mayor
"Scott Mayes, Commissioner
"Glenn McCullough, Commissioner
"Edward M. Duncan, Commissioner
"Kenneth Duncan, Commissioner
"Lynn Stanifer, Commissioner
"Jack Munsey, Commissioner
"William R. Stanifer, Attorney
[fol. 1078] "L. C. Ault, Recorder 8:30PM

"The following Resolution read by Attorney William R. Stanifer and after discussion, Motion By Jack Munsey, second by E. M. Duncan, Vote Taken & Passed

"Voting Yes. Jack Munsey, E. M. Duncan, Kenneth Duncan, Glenn McCullough, Lynn Stanifer Voting NO Scott Mayes.

"Resolved that the city's action previously taken to employ. counsel to assist in acquiring or constructing electrical distribution facilities be ratified and confirmed as limited by Title 6 Chapter 13 of the Tennessee

Code Annotated, said employment not to be a charge against the general fund or general revenues of the city nor to necessitate any additional tax requirement, but solely to be limited to and paid from anticipated revenues of the aforesaid facilities as prescribed in said chapter.

"Be it further Resolved that since no offer has been received from the Commercial Power Company serving within the city to sell us facilities, the Mayor is hereby empowered forthwith in the name of the city, as prescribed in TCA Title 6 Chapter 13, to contract for the construction of electric facilities to provide for the [fol. 1079] needs of the city, its citizens, and the residents of such fringe areas as he deems appropriate. This is to be effective on passage.

"No other business to meeting was duly adjourned.

"James B. DeBusk
"Mayor"

The Court: What was the date of that?

Mr. Ardery: This was dated October 21, 1963, Your Honor.

By Mr. Ardery:

Q. Is that a copy of the resolution that was passed at that time by your Board of Aldermen?

A. Yes, sir, it is.

Mr. Ardery: Will you mark that as Exhibit 108?

(Exhibit No. 108 was marked for identification and filed.)

By Mr. Ardery:

Q. Mayor, will you tell the Court a little bit about your efforts and efforts of others on behalf of the city to obtain low cost power? How long has this been going on?

A. This has been going on some several years. It was going on back when I was—before I became mayor. People have been complaining and wondering why they wasn't entitled to low cost power in that area, specifically because [fol. 1080)] they was laying between the two rivers. That's the Clinch River and the Powell River. We lie right between

those two rivers that feeds Norris Dam, which is TVA's facilities, part of their facilities.

[fol. 1081] Q. Did you seek advice from the Tennessee Municipal League on one occasion?

A. Yes, sir. We was trying to grab every point that we could to see if we couldn't obtain cheaper power. We did not have no other source of seeing where we could obtain cheaper power. We knowed that we couldn't go to KU because we wrote them letters and different letters and we couldn't get no correspondence from them, and so we seeked to go to this League that we belong to. That was the Tennessee Municipal League. And Mr. Crook——

Q. Was that Dr. Puett?

A. Yes, Puett.

Q. P-u-e-t-t, wasn't he?

A. I believe that is the way you pronounce it—came up and visited with us all in a meeting, and the first thing he asked us——

Q. Don't tell what he said but the fact is you did consult with the Tennessee Municipal League and they sent an expert to counsel with you; is that right?

A. Yes, sir.

Q. Did you also communicate with or have any conferences with the Public Service Commission of Tennessee?

A. Yes, sir, we did.

Q. Did you also seek assistance and advice from the Association of the Coops of Tennessee?

[fol. 1082] A. Yes, sir.

Q. What effect is there on land values in your town as a result of what service, electric service there is available?

A. The towns, it is stunted, the growth of the towns, in the building of homes and buildings on this KU power because they can—the property sales, I would say from a third to—otherwise, if a lot was selling for $400 it would bring five or six hundred if it is where they could get the TVA power or better Powell Valley power.

Q. Is there any comparison you can make with regard to the amount of construction of new buildings on lots in areas where they can receive TVA power through one of its distributors on the one hand and on lots in an area where they get KU power on the other?

A. We had lots in New Tazewell that have been sold for

some time, some five or six years, that we can particularly name, that they never did develop until we got the cheap power or the city power. And those I would say there are some 7 or 8 homes in that area and new homes and a lot of them heated by electricity that was developed in the last year in that one particular area that I can recall of.

Q. Has there been any substantial construction in the area where KU service is?

[fol. 1083] A. No. A good case, only one home that is in the New Tazewell area that was built, a modern home that is heated with electricity. Of course, there could be more but to my ability is one home, and this is a lady that works with KU.

Q. Mayor, prior to the passage of the resolution concerning which an exhibit has been put in, did you hear, was there an effort made by you to obtain the sense of the citizens of your community in writing as to how they felt about this?

A. That's right.

Q. What was that?

A. When I took office in 1960 I promised the citizens of New Tazewell that whereby that if there was any issue I wasn't sure on that I would like to get the sense of the people, and by that issue in this power business, we talked to Mr. Puett, and he told us that we could receive service.

Q. What did you do? Just say what you did to take the sense of the people.

A. We carried a petition and let the people sign a petition, where they wanted to get the sense of the people, where they wanted cheap power, city power or not.

Q. I think a copy of that petition as it was carried around [fol. 1084] has been made a part of this record here, but tell the Court what the results were from the opinion that you received from circulating.

A. We got very good results from that.

Q. Very good means what?

A. I would say we had from 5 to 7 to 1 that marked they wanted the city power. It is a very small per cent that signed that they did want although we had a few that wouldn't take either side.

Q. But it was 5 or 7 to 1 in favor of the TVA power or one of its distributors?

A. I believe that is right, sir.

Q. Now as you know the towns and TVA and Powell Valley are being accused of conspiracy to take customers away from KU; was that the fact of the situation as you see it?

A. State the motion, please, sir.

Q. They say, the plaintiffs say here that this is a conspiracy by TVA and Powell Valley and the cities to take KU customers away from it. Now are the people themselves the moving force or were TVA, Powell Valley and the cities who instigated this?

A. The people itself was the moving force in this.

Q. And in doing what you did as mayor you were following the express will of the people?

[fol. 1085] A. I was following the expressed will of the people.

Mr. Ardery: That is all.

Cross-examination.

By Mr. Rowntree:

Q. Mr. DeBusk, Tazewell has grown a lot faster—Tazewell and New Tazewell has grown a lot faster than some of the surrounding cities, has it not, compared to Maynardville?

Q. What about Rutledge?

A. Let me state the question this way. We have growed more in the last two years, and particularly the past year, than we have in the past.

Q. Of course, you have been annexing territory right and left like the City of Knoxville.

A. No, sir.

Q. You mean you haven't been annexing?

A. We have annexed very little in New Tazewell.

Q. I am talking about the general growth of Tazewell and New Tazewell. It has been far ahead of such towns as Maynardville and Rutledge that have TVA power, is that not true?

A. Well, in percentagewise I couldn't say. I couldn't say definitely.

[fol. 1086] Q. Won't you admit that TVA power is not the all and everything for a community to develop?

A. I would say it is one of the—it would be one of the greatest development if we could obtain TVA power or city power and keep it.

Q. Isn't the leadership in the community, the spirit of the people the most important thing rather than something like cheap power as you call it?

A. The leadership of our people is the, I would say they developed in the last 5 to 6 years and the come to wakening up, if I could say it that way.

Q. There is a spirit of growth up there.

A. And they have seen where the Kentucky Utilities has took some hundred and some thousand dollars out of our town and into another state that where our people could have it and they would grow that way.

Q. And it has been growing with Kentucky Utilities power, largely?

A. I would say the record of KU in the past 2 or 3 years, I could recall this one home that is electrically heated and I couldn't say it has growed.

Q. Well, we have had charts on the board showing the growth in Kentucky Utilities customers. That has been just about as rapid as the Powell Valley growth, that we had expert testimony of the percentage, comparison percentage [fol. 1087] between Powell Valley and KU after the—well, up until April 1964 as compared to the earlier time before this dispute arose in 1957, and the percentage was pretty close to the same; don't you recall that?

A. Did you say about as much or did you say as much, that KU has growed?

Q. Yes. The number of customers, the comparative position of the two utilities in the area.

A. Well, they growed some. All communities have growed some in he last——

Q. And KU has been furnishing this power up here for how long?

A. Well, they have been furnishing it since, I believe you said that—they said 1926; is that right?

Q. 1920 is the date. Now do you find any such comparable growth evidence in Maynardville or Ruthledge which are nearby communities having TVA power?

A. Mr. Rowntree, I know one specific, one case that I was raised in three-quarters mile of the town, or half to three-quarters mile of the Kentucky Utilities where their facilities was, in, I would say around the forties. I couldn't give a definite answer, I could if I thought. And that our parents and neighbors was trying to obtain electricity because we was—we didn't have no refrigerators, we didn't [fol. 1088] have no facilities, we even used a Delco plant, and so the Powell Valley was coming down in that area and my dad had done give a deposit of $5.00 for the power and when KU got the word or heard that they were coming in that area they rushed right at once and took them up.

Q. That shows initiative, doesn't it?

A. That shows that we wouldn't have grown if we hadn't had TVA power or Powell Valley power, and I think the record shows that.

Q. And, of course, there are area agreements up there that do affect—how long ago was that you are talking about?

A. I would say early Forties.

Q. And there have been area agreements that affect this business and——

A. Area agreement?

Q. Yes. Are you familiar with the area agreement?

A. I am not familiar with the area agreement; no sir.

Q. Were the aldermen opposed on this election you talked about here?

A. I did not say——

Q. You weren't opposed?

A. I did not say I had been. I said the other town had some opposition. I said all our aldermen was elected.

[fol. 1089] Q. All right. The election doesn't have anything to do with this case, does it? Does the election have anything to do with this case?

A. Well, it is a big instinct in the area, I would say that, but I am representing New Tazewell.

The Court: Is that all for this man?

(Witness excused.)

Mr. Ardery: We have got one more witness.

The Court: All right. This another mayor?

Mr. Ardery: No, your Honor, one of our attorneys.
The Court: Your name is Mr. Stanifer?
Mr. Stanifer: Yes, your Honor.

WILLIAM STANIFER, called as a witness by and on behalf of the defendant Cities, after having been first duly sworn, was examined as follows:

Direct Examination.

By Mr. Ardery:

Q. What is your name, please?
A. William Stanifer.
Q. Where do you live?
A. In Tazewell, Tennessee.
Q. What do you do?
A. I am an attorney and executive secretary of the Claiborne County Chamber of Commerce.
[fol. 1090] Q. Are you also the city attorney?
A. Yes, sir.
Q. For the town of Tazewell?
A. Tazewell and New Tazewell.
Q. Before we get to any factors relative to the city itself or to the Chamber of Commerce, let me ask you, Mr. Stanifer, do you have any business establishments you own in that area?
A. Yes, sir, I have several.
Q. Is this picture which was introduced by the plaintiff as Exhibit No. 50 of the Teacraft Marine Supply Company a picture of your business establishment?
A. Yes, sir. They have got it identified as the Old Marine Building. It isn't too old.
Q. Well, this was one of those that they were saying was the first three cut off; is that correct?
A. It is one of the first ones. It isn't the first one.
Q. The Sky View Motel and Mr. Hurst's residence, I believe, were the first two and then I think, according to the Kentucky Utilities' witness the next was the Teacraft Marine Supply; is that right?
A. Well, I assume that would probably be correct.

Q. Will you tell the Court the circumstances of that transfer?

[fol. 1091] A. Well, I requested—I called the KU office and requested that service be terminated.

Q. He said he got a call from the city attorney. You were calling as an individual power user, were you?

A. I was calling as an individual in regard to that.

Q. You were calling about your own property and your own service?

A. Yes.

Q. And you insisted it be on the city system, is that right?

A. Well, I just notified them to disconnect.

Q. Do you have some, or what was your relationship to the Chamber of Commerce?

A. I am executive secretary. I am in the terms of a general manager, as you might call it.

Q. I wish you would from your notes refresh your recollection there and give the Court the instances of activity on the part of the Chamber in its search for low cost power.

A. Well, the Claiborne County Chamber of Commerce originated about the year 1958 or early part of 1959.

Mr. Marshall: If the Court please, I thought Mr. Stanifer was offered as a substitute for Mayor Hardin.

[fol. 1092] Mr. Ardery: He is.

Mr. Marshall: Because Mayor Hardin is in the hospital. Mr. Stanifer was not going to testify as a separate witness.

Mr. Ardery: Well, I think we do offer him also because of his acquaintance with this dispute from the Chamber of Commerce.

The Witness: I notified Mr. Estep, I believe, Friday, that I might testify to introduce these Chamber of Commerce minutes.

Mr. Ardery: And they also took your deposition, didn't they, Mr. Stanifer?

The Witness: Yes, sir.

Mr. Ardery: They took—your deposition was taken on discovery; was it not?

The Witness: Yes, sir.

By Mr. Ardery:

Q. Go ahead, if you will.

A. As I stated, the Claiborne County Chamber of Commerce was originated in the latter part of 1958 or the first part of 1959, and I have been executive secretary ever since its origin.

Now the first action that the Chamber of Commerce took in regard to power rates was on April 10, 1961 in which, in looking at the minutes—I am looking at the [fol. 1093] April minutes. The Board of Directors and aldermen of the Claiborne County Chamber of Commerce met on the 10th day of April, 1961 in the office of the secretary at Tazewell. Members present: J. M. Campbell, Myer Ardenstein, Jimmy Estep, Frank Tyree, Clarence Payne, Joe Frank Essary, Roam Cardwell, Clyde LeMarr, William R. Stanifer, Don Thomas, Delbert England, Q. G. Fortson, Coolidge, Whittaker, Paris Coffey, Bill DeBusk, Will Fugate, and Dr. Bill Smith.

Now the part of the minutes referring to the power, I will just go to that particular paragraph.

"Discussion was then opened by the Chairman, J. M. Campbell, in regard to cheaper power for the citizens of Claiborne County. There was considerable discussion by the Board members. A motion was duly made by Clarence Payne and seconded by Frank Tyree that the Claiborne County Chamber of Commerce to take the lead and iniative and also as a project to investigate the possibilities of obtaining cheaper power rates or TVA rates in Claiborne County and that the chairman appoint a committee to obtain that purpose. Motion passed unanimously."

Now then I am referring to—this is a copy of the original if you want to file that.

(Exhibit No. 109 was filed.)

A. (Continuing) Referring to the May minutes of the Claiborne County Board of Directors of the Chamber of [fol. 1094] Commerce meeting on the 8th day of May, 1961 in Tazewell, members present: J. M. Campbell, Cotton Robinson, Lawrence Russell, J. D. Estep, Jr., Myer Arenstein, Dr. Livesay, Dr. Bill Smith, Q. G. Fortson, Reid Bailey, Cotton Grubb, Carl Bolton, Bill Marsee, Curtis Hopson,

Frank Tyree, Paris Coffey, Lee Dan Stone, Bill Brooks, Bill DeBusk, and William R. Stanifer, Secretary.

And the paragraph in the minutes, reading from the minutes:

"The Chamber discussed the project in regard to cheaper power rates. Lawrence Russell re-discussed the meeting in which he was present with TVA Chairman Vogel in that Vogel stated that we could obtain TVA power."

That is the end of the minutes, and now I might state that that at the time Lawrence Russell was chairman of the Claiborne County Chamber of Commerce.

Q. What was the reference made in the testimony this morning to Lawrence Russell?

A. There was reference he came with the Middlesboro group to Knoxville as a private citizen and not as representative of any organization in Claiborne County.

(Exhibit No. 110 was filed.)

Mr. Marshall: I make a motion to strike from the record the statement of Lawrence Russell as being hearsay, this [fol. 1095] not being part of a conspiracy of the Chamber of Commerce or people thereof. This is an effort to get Mr. Russell's statement in without bringing him in.

The Court: Do you insist on that?

Mr. Ardery: No, that is all right.

The Court: The motion to strike is sustained.

By Mr. Ardery:

Q. Go ahead.

A. Well, the June minutes, 1961—I will delete the reading of the members present. The only statement on this meeting was there was discussion in regard to what the Chamber has accomplished in regard to the project on obtaining cheaper power rates in Claiborne County. That is all of this.

Mr. Ardery: Mark that as Exhibit 111.

A. (Continuing) July minutes, 1961, deleting the members present.

"A committee was duly appointed by the Chairman to investigate the possibilities of cheaper power rates. Com-

mittee named: the three mayors of the incorporated cities, Tazewell, New Tazewell, and Cumberland Gap, Frank Tyree, Reid Bailey, and Rome Cardwell. A meeting was set for the committee on the 13th day of July, 1961."

(Exhibit No. 112 was filed.)

[fol. 1096] A. (Continuing) September minutes, 1961, reading a paragraph out of the minutes.

"Reid Bailey reported on the Chambers meeting with TVA officials in Knoxville, Tennessee. Mr. Bailey reported that prospects on cheaper power rates were somewhat bright. He further reported that the TVA officials revealed the fact that the area contract between REA and Kentucky Utilities would expire in January, 1963. Mr. Bailey reported that the committee was advised to meet back with TVA in a few months to go into the matter further. There was a lengthy discussion by the Board of Directors on this subject."

(Exhibit No. 113 was filed.)

A. (Continuing) March minutes, 1962, reading a paragraph therefrom.

"There was a brief discussion on what progress has been made in regard to REA power. The chamber encouraged that work continue in regard to this project."

(Exhibit No. 114 was filed.)

A. (Continuing) April minutes, 1962, reading a paragraph therefrom.

"The Chamber's project in regard to cheaper power was discussed and was reported by the Chairman that a meeting at Cedar Grove had been arranged at 1:00 p.m. on the 12th day of April, 1962 with Attorneys and interested [fol. 1097] parties."

(Exhibit No. 115 was filed.)

A. (Continuing) September minutes, 1962, reading a paragraph therefrom.

"The Chairman, J. M. Campbell, also discussed additional work which had been done since our last meeting with the TVA at Cedar Grove."

(Exhibit No. 116 was filed.)

A. (Continuing) Now I would like to state, going through my minutes of the Claiborne County Chamber of Commerce, there was some I was unable to find. Now we know the Chamber of Commerce had investigated this. They had actually come to the conclusion as to what they had accomplished through this project which they had taken upon themselves. The three mayors were members of the Board of Directors of the Chamber of Commerce, and some of our city councilmen were members, and the Chamber of Commerce, not being a governmental body within itself, knew that all they could do was investigate it and report to the cities. And they did make the report to the cities and the cities, although they had worked with this all along with the Chamber of Commerce, they began to take official action in regard to it.

Q. As regards your work as an attorney for the cities, I suppose, as you know, a resolution introduced here [fol. 1098] authorizing the mayor of New Tazewell to take action to institute a city system. Do you have a similar resolution for the city of Tazewell?

A. Yes. There is a resolution, Resolution No. 15. This is a copy of it, and it was passed on the 21st day of October, 1963.

Mr. Ardery: I ask that this be marked as an exhibit.

(Exhibit No. 117 was filed.)

A. (Continuing) It is the same resolution that was passed by New Tazewell.

Q. Do you have any other documents relative to this matter?

A. I have a copy which is just a copy of the contract which was entered into between the town of New Tazewell with Irby Construction Company in regard to construction of the municipal system, and this is a copy of the contract.

I don't have a copy of Tazewell's contract. I believe—I don't know whether the Mayor has it or not, but anyway, the Tazewell contract is almost word for word the same as the New Tazewell contract, and this contract was entered into on the 29th day of October, 1963.

Mr. Rowntree: If your Honor please, there is a whole [fol. 1099] series of these exhibits in the front of or attached to the ceposition of the mayors.

Mr. Ardery: That is what we have been looking for.

Mr. Rowntree: Have you been looking for them? It is over there in the corner.

By Mr. Ardery:

Q. I think it will suffice to let the record show that the two towns entered into contracts with the Irby Construction Company for the purpose of constructing the city system; is that correct?

A. Yes. I think that exhibit was filed with the mayor's testimony along with some of the other testimony.

Mr. Rowntree: And I would like to clear up, your Honor, that all of these other exhibits filed with those depositions are considered filed in the record here.

Mr. Ardery: Yes, sir, right.

Mr. Rowntree: Is that agreeable?

Mr. Ardery: Yes, sir. It is agreeable as far as we are concerned, if it is satisfactory with the Court.

The Court: All right. But the Court, unless counsel reads the points they wish to emphasize then the Court will not go through all of these exhibits.

Mr. Ardery: I understand.

[fol. 1100] The Witness: Now I have all the Mayor of Tazewell and the Mayor of New Tazewell applications to their city power system that were involved in this litigation.

Mr. Ardery: I don't think we need those.

The Witness: I might say that there was one of the cutovers that did not apply to the municipal system for power.

Mr. Ardery: In writing?

The Witness: In writing, yes. And as far as any contract existing between Kentucky Utilities and the individual customer, I think they alleged that there was three, those contracts was never known to the municipal system. Kentucky Utilities never informed the system there was any contract nor did the customer inform the municipal system.

Mr. Ardery: I believe that is all.

The Witness: There was one thing I wanted to state.

I don't think that the Court may be confused in regard to what has been testified in regard to this depressed area proposition.

There are two counties in the State of Tennessee that were placed on the depressed area and our county was one depressed areas along with Campbell County, Tennes- [fol. 1101] see. We were placed on the depressed area, it has been two or three years and we are still on the depressed area. We have not been taken off the depressed area list.

Under this depressed area bill, it is an Act which resulted from the depressed areas. We were fortunate enough to obtain a new industry which is under construction now. This new industry will employ within the next two years approximately 600 people. There is a good possibility that within five years there will be an employment of somewhere eight to nine hundred persons.

This new industry is under construction and is being supplied with TVA power, and they were located in New Tazewell on the firm commitment that they would receive TVA power, and there has been no objection to my knowledge from anyone for them being served by the temporary service supplied through the TVA power by Powell Valley.

The building is to be completed and occupied December 1 of this year, and it is one of the most important things we have ever accomplished and I think that they will add to the growth of our community from that standpoint.

[fol. 1102] Now you may—a map has been introduced from which there was testimony there was approximately a hundred and fifty Powell Valley Cooperative or municipal customers within the city limits at the present time. Now those are pretty well scattered and the communities are growing to those areas and the communities will eventually be abandoned where KU power is now if it's continued to stay in the condition it is now.

Cross-Examination.

By Mr. Marshall:

Q. Mr. Stanifer, what is the county other than Claiborne County, Tennessee, distressed county?

A. Campbell County.

Q. Where is Campbell County?

A. It's the adjoining county.

Q. Is it supplied entirely with TVA power?

A. I don't think so. I think——

Q. Who else supplies any power in Campbell County besides the TVA?

A. I believe KU supplies some power in the mountain region.

Q. Just that one little tag down there. Is Bryson in Campbell County?

A. I don't know. You are getting a little—to get in part [fol. 1103] of those counties, we have to go across two states. We have to go across Virginia and Kentucky to get there.

Q. I just want to know where Campbell County is.

A. Well, Campbell—Lafollette is located in Campbell County. That's the county seat of Campbell County.

Q. All right then, is Bryson in Campbell County?

Mr. Estep: Lafollette and Jacksonboro and Jellico is Campbell County.

Mr. Marshall: Bryson is over in Campbell County?

Mr. Estep: It's right on the line, I think. Part of it in Claiborne County and part in Campbell County.

Mr. Marshall: Just with the exception of a little——

Mr. Estep: All in Claiborne County.

Q. Then Kentucky Utilities supplies no electric power in Campbell County?

A. I don't know; I just don't know.

Q. Well, doesn't this map show it's all being supplied by TVA distributors?

A. All except the mountain region.

Q. That's in Claiborne County?

A. I don't know what this blue indicates.

[fol. 1104] Q. Well, it indicates a service area of Lafolette, service area of Jellico, both TVA distributors.

Mr. McCarthy: Glad to see that Mr. Marshall is accepting our maps, Your Honor.

The Witness: Well now, I don't know how much of this —I really don't know whether it's accurate or not. I don't know. The map——

By Mr. Marshall:

Q. Well then you don't know who supplies that distressed area, county?

A. Well now, the reason Campbell County came in depressed area in my opinion is because of the coal mines.

Q. And then it really doesn't have anything to do with who supplies the electricity. There are other circumstances?

A. Well, Lafollette is prosperous as far as I know, every time I've been there, the city of Lafollette.

Q. Now hasn't Powell Valley been supplying this geographical area of Claiborne County and this area of Claiborne County for, oh, twenty years, say?

A. Yes.

Q. But it's still in the distressed area although it's been supplied with TVA power all of that time, isn't it?

A. It's in the distressed area.

Q. That's right.

[fol. 1105] A. I don't know whether they are still in it, but I know that they were placed in the distressed area.

Q. Do you operate the business at Teacraft Marine?

A. Oh, no.

Q. You just own the building?

A. I just own the building. At that time I had lost a tenant, and it was in between. I didn't have a tenant at that particular time.

Mr. Marshall: That's all.

The Witness: there was one other thing I wanted to say that the letter written by the mayors to Kentucky Utilities on September the 26th, 1963, and I refer to— I refer to Exhibit 10 in which they were informed that:

> "Tazewell and New Tazewell expects in the immediate future either to acquire the existing facilities in the Tazewell-New Tazewell area, or to construct a system to provide service in this area.
>
> "We will be glad to consider any proposal Ken-

tucky Utilities may have for acquisition of existing facilities in this area and we would expect to pay for these facilities the depreciated cost plus reasonable severance."

[fol. 1106] In regard to this particular letter, Your Honor, there was no reply received from this until after the construction had started some five weeks later. Kentucky Utilities did not respond to this letter, and the only response we got was after construction had started for the municipal systems.

By Mr. Marshall:

Q. Didn't you, as a practical matter, know at that time that Kentucky Utilities was not interested in selling you its facilities in those two towns?

Did you really need a response to that letter?

A. Well, they are not in the habit of that, I'll say.

Q. You pretty well had an idea what its position was without a letter, didn't you?

A. Well, we had prepared a resolution for the cities for Kentucky Utilities to join with us in filing a petition before the Public Service Commission for a reduction of rate, and Kentucky Utilities replied from a letter then saying that they was losing money in our area.

Q. What was that last?

A. Didn't show a profit.

Q. What was the last?

A. Just a minute, I think I have got it here. I think it's right here.

[fol. 1107] In response to that letter, we received a letter from Mr. Fairman, president of——

Q. Wait a minute, I want to go back and get the last answer. I thought you said you wrote the Tennessee Commission and the Tennessee Commission wrote you back some letter about the rates.

A. No, we wrote Kentucky Utilities to join with us in applying to the Public Service Commission for a reduction in rates.

Q. Hadn't you already applied to the Public Service Commission on the rate matter?

A. No, there had been a letter written, I understand, but I don't know about this letter.

Q. You don't know about that letter?

A. No.

Q. Do you know about the reply from the Tennessee Commission?

A. No, I don't.

Q. You never heard anything about it?

A. Well, I heard something about it, but I don't know enough about it to testify about it.

Q. Did you hear that the Tennessee Commission wrote that they had made an investigation and that there wasn't any basis for ordering KU to lower its rates?

A. No, what I understood was that they didn't have enough information to go on from the letter that was [fol. 1108] written.

But this letter returned from Mr. Fairman, reading a paragraph out of this letter states:

> "Our rates in the two cities are as low as those in the adjoining larger communities in Kentucky; and at present these rates are being maintained at a level which does not produce an adequate return on the Company's investment."

Mr. Marshall: That's all.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Ardery: If Your Honor please, I think if we could have about two minutes here, we may be able to announce closed for the cities and for Powell Valley.

The Court: All right.

Mr. Pedersen: So the record will be clear on this, the deposition of Mr. House and the others that have been filed as if they were read into the record carry with them the exhibits referred to in those depositions?

The Court: Yes, sir.

Mr. Pedersen: We wanted to make sure that that was understood.

The Court: With the understanding that if counsel want to emphasize any exhibit to the Court, it will do so. The

[fol. 1109] Court will not undertake to pick out these exhibits and try to find something on one side or the other.

Mr. Pedersen: Not necessarily read them in evidence, but to bring them to the Court's attention in the argument?

The Court: That's it exactly. Yes, sir.

Mr. Pedersen: All right, sir.

The Court: I think I read every exhibit that was filed with the file last week. I'm not sure when the file was turned over to me.

Mr. Ardery: That's all as far as the towns and as far as Powell Valley are concerned.

Mr. McCarthy: We are ready to close, Your Honor. We do have that deposition of Wilson House that counsel for Plaintiff indicated they might want to cross examine him some more on. If they could give us an answer on that, we could close.

Mr. Marshall: What time does the Court have in mind adjourning for the day?

The Court: Well, I was going to finish today, but the reporters——

Mr. Marshall: Pretty well bogged down?

The Court: Well, they rather reprimanded the Court for going beyond 4:30.

Mr. Marshall: Well, it's 4:26, and I sure [fol. 1110] wouldn't want to be the means of getting you in trouble with the reporters.

I was wondering if this might be an appropriate time—what I really was thinking about, I don't think we are going to have any cross of Mr. House, but we would like an opportunity to look at this deposition, and it's quite lengthy, and I think we would want to consider over the evening whether we would have any slight rebuttal to put in. We could do all of that, I'm sure and finish very rapidly in the morning.

Whatever the Court wishes on it, of course.

The Court: Well, we had a jury that was supposed to come in today which we notified not to come, and told the jury to come in the morning. I understand there's another case that was already set for tomorrow and one set for Friday.

Mr. Marshall: If the Court please, I'm still going under the assumption which maybe is wrong that the Court wants oral argument on this case.

The Court: I do.

Mr. Marshall: Right after it was finished.

The Court: That's right.

Mr. Marshall: If we finished this afternoon, you wouldn't [fol. 1111] expect to have oral argument today, would you?

The Court: No, first thing in the morning.

Mr. Marshall: Well, I think we can finish anything we have very shortly and then go right on to oral argument if that's agreeable.

The Court: Well, how many minutes at the most that you would take do you think?

Mr. Rowntree: Can we talk a moment, Your Honor?

The Court: Yes.

Mr. Marshall: If the Court please, on the argument, there seems to us to be basically three areas, some law points on standing to sue and matters of that sort.

The Court: Yes.

Mr. Marshall: Mr. Welch has done all the work on that and knows the cases and will argue that part of it. Then there's the conspiracy count for whatever the weight the Court wants to give it or as much as you want to hear of it or as little as you want to hear of it. We are not going to burden you with argument you don't want to hear.

And then there's the major point of service area in which there will be quite a bit of reference to the maps and those [fol. 1112] facts in relation to the language of the TVA statute.

I would say—I don't want to horrify you with the suggestion, but maybe an hour and a half on all of those three points together. This is a rather major case to us, and we don't want to slight the factual portion of it at all or any part of it for that matter.

The Court: All right. Would that amount of time be satisfactory with you?

Mr. McCarthy: I think so, Your Honor, if we could have the same time as the Plaintiff.

The Court: Yes, you shall have the same time.

Mr. Marshall: I would sure appreciate it if we not be held too tight. We are just estimating. With the wealth of exhibits—I'm not going to try to cover every one of them.

The Court: Well, I think we will have to limit it with this jury coming tomorrow.

I would like for you men to outline the argument in your minds tonight and be ready without having to stop to find an exhibit. You may have all of tonight that you want to. Counsel for both sides may take these exhibits out from the Court, from the record if you want to.

[fol. 1113] Mr. Marshall: We have reasonably complete sets of them.

The Court: Just notify the court reporter that you are doing it for either side, and then just come here in the morning with them in your hand ready to argue.

Mr. Marshall: Judge, it's just that I don't know whether we can cover a case of this sort with an hour and a half.

The Court: Well now—you want me to tell you how the Court's thinking? You men for both sides, if you want me to, I will; if you don't want me to, I won't.

Mr. Marshall: It would be very helpful to both of us.

Mr. McCarthy: Very happy to, Your Honor.

STATEMENT BY THE COURT

The Court: With the understanding that the Court reserves the right to change many times as it thinks it should change.

Now it is my offhand opinion that the utility company, if it's hurt by reason of this—what has been done in the two Tazewells and if it has a right of action by reason of the 1959 Act, it has standing to assert that right in this Court.

Now that question isn't foreclosed, and I want you to site [fol. 1114] a case each side, the side that thinks the Court is wrong, cite cases or a case, just one or two cases. I don't want a large number of cases. One case, two cases ought to be cited.

Now you may cite the case you think—you have cited the 6th Circuit case already. The TVA has cited the two Supreme Court cases, and then one of the Circuit cases.

Now I think those cases are distinguished from the facts in this case, and I think your case dealing with the bank and the comptroller's authority to issue permits are more compatible with the situation in this case than are the cases cited by the TVA. In other words, in TVA's Supreme Court cases, the Court held in substance that the competition was legal, and therefore, the fact that one of the competitors borrowed money wrongfully from a government official

didn't give the person who was allegedly hurt the right to question that loan.

[fol. 1115] The Court said in substance, that if that were the law that it would open up too many avenues for litigation and each loan that was made by a government agency would likely be questioned and a long drawn out litigation would follow.

In this case, if the private utility is hurt—I mean, is right on the law, of course it is hurt because it will have many, if not all, of its customers taken away. And that, in the opinion of the Court, just thinking out loud, is an injury that may be asserted or an injury for which a remedy may exist in the law.

Now the other question Mr. McCarthy is very much concerned about, or he is very vigorous in his position, that the findings and conclusions of the Board—and he accidentally or purposely pointed to the Court this morning and and reminded the Court that these three TVA directors take the oath of office in the performance of their duty, indicating that they take the same oath that the Court did and the Court grants that, and the Court would not intimate that each of these directors would not comply with everything in that respect—I don't know, but I think he used that argument to impress that on the Court. But I am presently [fol. 1116] of the opinion that the findings and conclusions of that Board do not foreclose the private utilities' right to have a court pass on it.

The Court does not mean to intimate to anyone at this time that the directors' of the TVA findings and conclutions are wrong. Undoubtedly they thought they were right, but if Mr. McCarthy is right on that then whatever the TVA says about the area, unless of course they act arbitrarily or whimsical, the Court is foreclosed on these matters.

The Court is in the same position as the witness Miner. Miner said that the easiest way for him would be to just let it go on but he couldn't handle it that easy, and neither can the Court. The easiest way for the Court in this case is just to say that the Court has no right to go into this matter.

I do not believe that the Congress intended to say that the adjudication of the directors of the TVA was final and

depriving all the interested parties of the right to go into court and test out the conclusions and findings of the Board.

The Court has written two memorandum opinions supporting Mr. McCarthy's view on the findings and conclusions [fol. 1117] of the directors in certain aspects. For example, if the TVA takes land and the land owner in this court has stated that the TVA has no right to do it therefore he is asking the Court to set aside the order appointing the commissioners to evaluate the land, fix the damages.

Now the Court said distinctly, as it remembers, in writing and more probably than two times other than memoranda in the files, that when the Board of Directors act in situations of that kind their action is final and the Court has no right to question it unless it is in bad faith or things of that kind, or arbitrary.

The Court has no inclination in this case or in any other case to question the action of these directors—no, no. They have their duties just like the courts have theirs, but if the law requires the Court to go into these matters then the Court must do it.

Now you say in your brief, as the Court recalls, Mr. Marshall, that the TVA has cited no cases on that point and you are not belaboring that, indicating that if they do you will go into it at a later date.

Now you know, Mr. McCarthy is a good lawyer and when he argues something, as he has done with vim, [fol. 1118] then the Court takes notice. The Court felt that the point was not well taken but the Court is not foreclosing it and if you have authority on the point then you should cite it or be prepared to argue it here tomorrow.

Now here is the controlling point, as the Court sees it. I don't know whether I have covered all those preliminary points or not. Understand the Court only makes these observations to assist counsel in preparing the argument for tomorrow so we can go right to the controlling points in the lawsuit.

Now on this 15d, here is a portion of it and this is the language that is giving the Court much concern:

> "Unless otherwise specifically authorized by Act of Congress, the corporation shall make no contracts for the sale or delivery of power which have the effect of making the corporation or its distributors directly or

indirectly a source of power supply outside the area for which the corporation or its distributors were the primary source of power supply on July 1, 1947 and such additional area extending not more than five miles," and so forth.

[fol. 1119] Skipping a good deal of page 22 of this Act, and page 23, it continues:

"Nothing in this sub-section shall prevent the corporation or its distributors from supplying electric power to any customer within an area in which the corporation or its distributors had generally established electric service on July 1, 1959."

Now undoubtedly this proof shows that the TVA was in that area, was in the Tazewell and New Tazewell areas on July 1, 1957, that they were serving some 20 or more customers at that time but that the private utility was serving many more customers within the corporate limits at that time. As the Court recalls from memory four or five hundred customers at that time.

Now here in the additional language:

"... and to which electric service was not being supplied from any other source on the effective date of this Act."

Now the service was being supplied to these, say, we will use the number 400 customers by the private utility company.

The TVA says that applies to the area that is in the exception, five miles or out; that it does not apply to these Tazewells.

[fol. 1120] I have been under the impression up to this time that it did, but I am not—one witness testified that it did not. Mr. Wessenauer testified, I believe, it applied to the five mile area, but in reading these Senate reports I think I remember statements made by Senator Cooper over here in our neighboring state and who was for this 1959 Act, who was friendly to the objects sought by this Act, very friendly, he said, as I recall in substance, that if this language was left in there it would deprive some of his constituents who were

in a situation just like Tazewell and New Tazewell who wanted to get away from the private service and get the TVA service, and that this language ought to be taken out of there, or words to that effect.

[fol. 1121] As I recall, Senator Randolph of West Virginia, responded along the same line, and there was probably another Senator. Now as I say, I haven't—if you have this House report, I'd like to read it tonight if I could. I mean the pertinent parts of it. If it's been marked. I don't think I have had access to the House report, but I have had access to the Senate report.

Now those are the problems.

Now on this alleged conspiracy, gentlemen, you can talk all you want about that, but this testimony strikes the Court that we have a group of people in the two Tazewells, a few of them are being served by the public power operators. They naturally get lower rates.

Now the ones who are served by the private companies admittedly have to pay higher. Now you can see the turmoil that that creates.

Of course this Court is not going to intimate, infer, willingly about who is right and who is wrong with respect to this public power and private power. That contest has been going on for years and years, and that has nothing to do with it insofar as this Court is concerned. This Court must decide this case according to this evidence and this appli-

[fol. 1122] cable law.

Now I can't see—maybe you can show me—that when the mayor, the mayors and the Chambers of Commerce, right or wrong, when they get together and say we want to get this lower power, and they seek the help of the co-op, and they seek the help of the Public Utilities Commission, they seek the help of the Municipal League, they seek the help of the TVA, and the TVA responds and the co-op responds —now, Mr. Rowntree, I consider you an expert on conspiracy, and if you can't work out one, I don't know of any lawyer in Tennessee who can.

I just can't—now that's the way and with that said, we will adjourn Court. You gentlemen——

Mr. Ardery: If Your Honor please, I have an extra copy of the hearings before the Senate and the House both here, and I would be happy to have you use them.

The Court: I have it before the Senate.

Mr. Ardery: Have you?

The Court: Yes, sir.

Mr. McCarthy: Is it the hearing or the report that Your Honor wants?

Mr. Ardery: Here is the report of the individual views, and here is the House report. See if that is what you are [fol. 1123] looking for.

The Court: Yes, it is.

Mr. Ardery: I might ask you for those back.

The Court: All right. This is the—which one is the House?

Mr. Ardery: This is the House here. Here are some individual views of senators, and I think they have a very important bearing.

The Court: All right.

Now, gentlemen, is there a question from anyone, any counsel want me to—anything you want to say before we adjourn until tomorrow morning at nine o'clock.

Mr. Pedersen: We can leave everything here I assume.

The Court: Yes, sir. And here's an exhibit.

All right, adjourn Court until tomorrow morning at nine o'clock.

* * * * * * *

[fol. 1124] Fourth Day of Trial

Thursday, September 24, 1964

(At 9:05 a.m., court reconvened pursuant to adjournment, when the following proceedings were had.)

The Court: You may proceed, gentlemen.

Mr. McCarthy: If the Court please, we had substantially completed our proof yesterday. I would like at this time though to offer the answers of the plaintiff to the interrogatories propounded by the TVA and ask that they be considered as read.

Mr. Marshall: We have no objection. There are a number of those interrogatories to which TVA undertook to ask us questions as to the law, what is our interpretation, what would the Act mean in a certain factual situation or were we contending a certain thing.

We did not feel that answers to interrogatories was the place to set out legal contentions. We answered those in the main whether we were or were not in this case making the particular contention by the reference to the prayer of our complaint.

I anticipate by putting all of these in, since all the other factual data is in, that TVA may under that insistence in its argument say that we did not make those contentions [fol. 1125] and under the interrogatories were not making those contentions in the case. Today in the argument, I think, is the place to spell out the contentions, and we will do that.

Mr. McCarthy: The only other question is whether Mr. Marshall wishes to cross examine Mr. House.

Mr. Marshall: No.

The Court: No.

Mr. McCarthy: Then we rest.

Mr. Marshall: The TVA has closed then?

Mr. McCarthy: Yes.

Mr. Marshall: We have one very short rebuttal witness. Mr. Lewis.

Milton H. Lewis, a witness on behalf of the plaintiff, having been previously sworn, was called in rebuttal, was examined and testified as follows:

Direct examination.

By Mr. Marshall:

Q. You are Mr. Milton H. Lewis?

A. Yes, sir.

Q. You previously testified?

A. Yes, sir.

Q. Mr. Lewis, it has been suggested and maybe is in evidence, I frankly don't recall, that some customers of [fol. 1126] Powell Valley were on July 1, 1957 located within what was defined by the Rowe and Osborne maps as the KU service area.

My question to you is outside the city limits of Tazewell and New Tazewell but otherwise within the KU service area

as defined by Powell Valley and KU, how many Powell Valley customers were within the KU service area?

Mr. Ardery: I object. If your Honor please, he said as defined by Powell Valley and KU, and we do not admit that there is any definition by Powell Valley that there was any service area there.

By Mr. Marshall:

Q. I believe, if it will help correct it, amend the question to be as indicated on Exhibit 14, that being the Rowe and Osborne map.

Mr. Ardery: All right.

A. There were 16 customers.

Q. Powell Valley customers?

A. Yes, as shown on the map of the defendants showing the customers of their distributors.

Mr. Marshall: That is all.

The Court: Read the question and answer. I didn't get the question.

Mr. Marshall: May I explain it to the Court?

The Court: After it is read then you can explain it.

[fol: 1127] (The question and answer were read by the reporter.)

The Court: What does that mean?

Mr. Marshall: These maps defined, this map defined KU's service area, or at least the boundary between KU and Powell Valley. It was suggested the other day that there were some substantial number of Powell Valley customers inside the KU service area.

The question was outside of the city limits of Tazewell and New Tazewell but otherwise within the KU service area on July 1, 1957, how many Powell Valley customers were there over in the KU service area, and the answer is there were 16.

The Court: What is your area? It is my understanding up to this time that outside Tazewell and New Tazewell that the co-op had many more customers than the private utilities. Now I don't understand.

Mr. Marshall: I am certainly glad of an opportunity to clear up that situation.

In 1960 this map was made by a representative of Powell Valley and a representative of KU. It included not only Tazewell and New Tazewell, it included all of the area in Claiborne County where KU and Powell Valley bordered, [fol. 1128] and it established a KU service area so far as Powell Valley was concerned not only in Tazewell and New Tazewell but extending as a point on the map clear up here including Shawnee, Cumberland Gap, Harrogate, coming on up to the Tennessee state line. This being designated on this map as KU service area. And what we have referred to as the corridor extending from Tazewell and New Tazewell on up into the area of Bell County, Kentucky.

Powell Valley and KU just did not define the service area in these two towns. They defined it all the way up to the Tennessee state line.

The Court: You say as of July 1, 1957 the co-op had 16 customers in the area which you claim was allocated to you?

Mr. Marshall: Yes, sir.

The Court: To your company?

Mr. Marshall: Outside.

The Court: Outside of the two Tazewells?

Mr. Marshall: That is right. The evidence already shows how many were inside and we wanted to show how many were in this corridor of Powell Valley. That was the sole purpose.

The Court: How many—to refresh my recollection, if [fol. 1129] you remember—how many customers did Kentucky Utilities have outside of the two towns as of July 1, 1957?

Mr. Marshall: I believe the figure is 1,278.

The Court: The co-op as of that date had how many, many more, as of July 1, 1957?

Mr. Marshall: Are you referring to the entirety of Claiborne County?

The Court: Yes, sir.

Mr. Ardery: I think the figure is that distributors of TVA had 3,564 consumers in Claiborne County and Kentucky Utilities had 1,839.

The Court: Those are the figures?

Mr. Marshall: That includes—the reason I did not have

that figure on that on the tip of my tongue, that includes Lafollette and Powell Valley distributors, Lafollette being——

The Court: That is in Campbell County, isn't it?

Mr. Ardery: This is Claiborne County, if your Honor please. It would include from the Lafollette system but it is in Claiborne County.

Those two figures I gave you, the ones of KU include those within the towns and outside the towns but only in Claiborne County.

The Court: What I want to know, the customers [fol. 1130] outside of the towns of Claiborne County served by a co-op. If you can, give it to me. Not precisely.

Mr. Marshall: Well, are you talking about just Powell Valley or are you talking about all TVA distributors in this county, because if you are——

The Court: I didn't know there were any other distributors of TVA power in the county except the co-op and now the towns have started, and that is what the lawsuit is about.

Mr. Marshall: No, sir. In this whole area of the county over where I am indicating on this map, being the western portion of Lafollette, the City of LaFollette electric system distributes TVA power, and that figure that Mr. Ardery gave you of Thirty-five hundred and some customers in the county getting TVA power includes the Lafollette customers too.

Mr. Ardery: That is true, if your Honor please.

The Court: I didn't know that until this time. How many customers does the Lafollette system have in Claiborne County?

Mr. Ardery: If your Honor please, if you recall the TVA Act says "the area for which TVA or its distributors were the primary source of power."

I am saying that TVA or its distributors on [fol. 1131] July 1, 1957 had a total of 3,564 customers in Claiborne County. That was in and out of the towns.

And on that same date Kentucky Utilities had 1,839.

I think I am correct that on that date TVA or its distributors had 28 customers in the towns. I believe we are in agreement on that. Now Mr. Marshall is correct in saying——

The Court: And Kentucky Utilities had how many?

Mr. Marshall: 561, I believe that figure is.

The Court: 561. All right. The Lafollette and the co-op—I didn't know that Lafollette was in there.

Mr. Ardery: They are a TVA distributor.

The Court: Where is Lafollette?

Mr. Marshall: It is over here in the——

The Court: I mean, is Lafollette here today?

Mr. Marshall: They are not involved in the action.

Mr. Ardery: They are not involved in the action, KU is not after them.

Mr. Marshall: I would say it differently, that Lafollette is not after KU.

The Court: All right.

[fol. 1132] Mr. Marshall: That concludes the rebuttal. It concludes the questioning of this witness.

Mr. McCarthy: No questions.

Mr. Ardery: No questions.

(Witness excused.)

Mr. Rowntree: If your Honor please, in rebuttal we would like to put into the record the deposition of Mr. Wessenauer and the exhibit to that deposition.

Mr. Marshall: If the Court please, it is with right much reluctance that I mention this next matter before we close.

Yesterday Mr. Smith undertook to testify for one purpose or another as to what was in the minds of a committee of Congress or of the members of Congress when they enacted this TVA Act.

The Court: To satisfy you on that, the Court is not going to base its decision on that. The Court is going to follow the word of the Congress unless the TVA, before this trial ends and before this record is made, shows the Court some authority that it has a right to consider oral testimony of a member of a body about what occurred in that body when a written record was made by the body. Just like this Court, it only speaks through its minutes, through its [fol. 1133] records, and what this Court says outside of its minutes goes for naught.

Mr. Marshall: That does leave us in something of a dilemma. We did not inject this matter into this trial. We

are simply trying to defend ourselves against something that was injected by TVA Congressman Smith's testimony.

The Court has indicated in its statement now that possibly if the case is presented that you might consider Congressman Smith's testimony.

The situation we are in is this. In support of a motion to strike yesterday, I stated I did not think the testimony of a legislator of what his understanding of what was in the mind of Congress was competent for any purpose.

The Court: The Court is of that opinion at this time but the Court did not rule on it with finality.

Now, counsel, with all due deference, with able counsel on each side, when a question like this is presented, counsel should, especially when the Court hasn't had it up before, cite authority.

Mr. Marshall: If the Court please, we searched last night for authority. I think this may be one of those situations [fol. 1134] where there is a wealth of authority because not many people have offered to do what Congressman Smith offered to do yesterday.

The most we can find is a statement in 70 ALR merely including this subject among the annotations by citing one case. ———— v. Spahr. It is 1904 case, 102 Virginia 306, 36 S.E. 378, in which the Court approved the doctrine that it could not resort to opinions of individual members of a constitutional or legislative body on consideration of a construction. It was attempted to show by letters from eminent members of the constitutional convention that in their opinion the convention intended to accomplish a certain result. That is as close as we can find.

My point in bringing this up at this——

The Court: I don't believe Mr. McCarthy is insisting that the Congressman's testimony about what was in the minds of the members of his committee at the time they acted on this is competent.

Are you, Mr. McCarthy?

Mr. McCarthy: I am not insisting that Mr. Smith's testimony goes at all to the question of the legislative history. I agree with your Honor that in considering the legislative history you should look only to the printed record.

[fol. 1135] I offered Mr. Smith's testimony for a very limited purpose. It was to show the considerations that the members of the TVA Board had in their minds when they were passing on this question of what part of Claiborne County could be served. And as a member of the TVA Board, Mr. Smith had a right to take into consideration his own knowledge of the legislative history. And Mr. Wagner and Mr. Jones, both of whom worked very closely with this bill during the time of its enactment, and attended committee hearings, were thoroughly familiar with it, they had the right in making their decision to be guided by their background and their knowledge of what took place.

Directors passing on a problem are not supposed to operate in a vacuum. They are supposed to bring to it their knowledge and experience that they gained through their lives from whatever source it happened.

The Court: That is comparable to the workings of a jury, is it not?

Mr. McCarthy: That is right, and it happened that the three directors here did have intimate knowledge of the legislative history beyond the printed record and they had a right to consider it, and the point that I was introducing [fol. 1136] it for was to show that these directors really are in a better position to pass on a subject of this kind than is a Court because they have all this knowledge gained through their experience in this field.

Mr. Marshall: If the Court please, that does not go to my point. Mr. McCarthy says this testimony of what was in the minds of members of Congress is competent for a limited purpose.

My point is that it is not competent testimony for any purpose, and I will tell you why I say that.

We are in the position, our representatives contacted the ranking minority member last night of the same committee of which Mr. Smith was a member. That is Congressman Scherer, and we put to him two questions.

Did the members of this committee understand or assume that all of Tennessee except Kingsport was in the TVA area? That was number one.

Number two: Did the members of this committee understand or assume that the TVA Board, without any recourse

to the Courts, could make a binding determination of this area?

Congressman Scherer said that neither of those points was discussed or even mentioned in his presence, and that [fol. 1137] he had no such understanding and that he does not believe that other members of the committee had such understanding.

If it is competent for one Congressman to get up and state what was in the minds subjective of members of Congress, then there would be no end to this kind of testimony at all. You would have a lineup on one side of one economic persuasion and the other on the other, and that is part of the reason we objected yesterday to the introduction of this testimony on its competency for any, even limited, purpose.

We are in the position to bring to the Court, if you think it is material, and we do not know, testimony by Congressman Scherer as to what he understood and as to what was discussed in his presence.

Mr. McCarthy: If the Court please, I think any testimony by Congressman Scherer would be incompetent; that Mr. Marshall is suggesting that he would like to do what I did not do. To some extent Mr. Marshall went into this on cross examination of Mr. Smith, Congressman Smith and as far as Congressman Scherer is concerned his memory is evidently faulty because the minority members of the House committee filed a report in which they said that they accepted TVA's testimony as to what the service area was. [fol. 1138] That may be a slight overstatement of it, your Honor, but I have prepared here some excerpts from the legislative history, and you will find on page 2:

"The minority took the view that the service area language of the bill, as introduced, resulted in a definition of a new enlarged area in which TVA could market its power; and it would in reality broaden the present TVA service area by more than 25,000 square miles (according to testimony by the representative of TVA, the present area of service is 80,000 square miles)".

Then down below are the recommendations of the minority, and one of them was, "limit the service area of the TVA to that now served (80,000 square miles)."

Now that 80,000 square mile figure comes from the testimony—it is the area shown on the three maps that Mr. Wessenauer presented, and the members of the minority as well as the members of the majority accepted those maps as establishing TVA service area.

The Court: Mr. Marshall, what do you want the Court to do?

Mr. Marshall: I don't think they said so in their official report.

[fol. 1139] Mr. McCarthy: That is the official report I was quoting from.

Mr. Marshall: That the official report says nothing about a map.

The Court: No, I mean the testimony. What do you want to do? Now if you have the Congressmen here, I will hear him like I heard the other Congressman.

Mr. Marshall: I don't have him here. This testimony yesterday was a complete surprise. We had no way to anticipate that.

The Court: I don't see that you or Mr. McCarthy agree. You are not understanding each other.

I think that Mr. McCarthy is saying to the Court that the ex-Congressman and now director over here in Knoxville possesses more expertise, as they call it, on this matter than the ordinary person because he was a member of this Public Works Committee of the House for a number of years and followed the bill closely; that Mr. Wagner and Mr. Jones attended the hearings in Congress and kept up the bills and that made them better fitted to possess more knowledge than the ordinary director in a situation of this kind.

That is what I understand he is saying to the [fol. 1140] Court. He is not saying that the workings of the mind of the Congressman—what is his name, over here now, ex-Congressman?

Mr. McCarthy: Smith.

The Court: Smith, is competent, and the Court is not going to consider the way his mind worked or the way the other members of the committees minds worked except as the workings of their minds were reduced to writing in these reports.

Mr. Marshall: On that basis we close our case.

(A discussion was had concerning the length of oral arguments, following which counsel for the respective parties presented oral argument to the Court.)

The Court: Well, gentlemen, this is going to be a very difficult case for the Court to decide, very definitely. It has been tried extraordinarily well. I don't think it has been over-tried and it has certainly been fully tried. It involves so many exhibits it is going to be difficult for the Court to find the controlling exhibits if those exist.

Now, for the attorneys of the private utility, the points are clear and can only be a decision for the private utility. [fol. 1141] For the public utilities the points are very clear and there can be only one decision and that is in favor of the public utilities. Well, it is not going to be that easy for the Court.

Frankly, the Court is further away from a decision at this very point than it was earlier in the trial. The Court felt as the proof developed and before it ended that the Court might be in position to decide it from the Bench, make formal findings of fact and conclusions of law like it does in an ordinary case, but the Court is convinced at this time that it cannot do that to its own satisfaction.

That being the situation, the Court requests counsel on each side to prepare an additional brief which summarizes the respective positions, and the briefs not to be longer than ten pages, fifteen at the most. Counsel on each side to point out the controlling points, points the Court should decide in the light of the record that has been made up during the past three and a half days.

Counsel for each side have submitted good trial briefs but maybe the proof has changed some of the positions; if so, the Court wants to know the changes.

I would like a summary of all that has taken [fol. 1141a] place during the trial and prior to the trial. I think the brief should deal largely with the question of what was meant in the Congressional Act of 1959 by the primary service area.

Now that question has been extensively argued here today. The Court is going into another trial right after this and another one after that one and another right after that one, and so what has occurred, if it gets out of the

Court's mind it would be most difficult to get back in, and I would like to reach a decision if possible while the case is fresh in my mind and of all parties.

I would like for those briefs to be submitted within five days. Maybe by that time the Court will be in the position to study it then. Certainly I am not in a position now as I am going to start in a trial right this minute.

Does either side have any comment?

(A discussion was had concerning date for filing briefs. Briefs to be submitted on or before Wednesday, September 30, 1964.)

The Court: All right, these proceedings are adjourned then.

(This is all of the proceedings had in this cause.)

[fol. 1142] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1143] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY, PLAINTIFF,

v.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, Individually and as Mayor of Tazewell, Tennessee, JAMES B. DEBUSK, Individually and as Mayor of New Tazewell, Tennessee, Defendants.

JUDGMENT—October 21, 1964

This cause came on for trial before the Court without a jury on September 21, 22, 23 and 24, 1964, The Honorable Robert L. Taylor, District Judge, presiding, and the issues having been duly tried, and the Court having found against the plaintiff and in favor of the defendants as set forth in the memorandum opinion filed on October 15, 1964, which opinion contains the Court's findings of fact and conclusions of law in this cause, it is hereby

Ordered and Adjudged That the plaintiff take nothing and that the action be and the same is hereby dismissed on the merits, and that the defendants recover of the plaintiff their proper costs for which execution may issue.

Approved for entry.

Robert L. Taylor, United States District Judge

Approved as to form:

John A. Rowntree, Attorney for Plaintiff Kentucky Utilities Company. Charles J. McCarthy, Attorney for Defendant Tennessee Valley Authority. Clyde Y. Cridler, Attorney for Defendant Powell Valley Electric Cooperative. Philip P. Ardery, Attorney for Defendants Edward J. Hardin and James B. DeBusk.

[File endorsement omitted.]

[fol. 1144]. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

MOTION FOR INJUNCTION PURSUANT TO RULE 62—Filed November 2, 1964, omitted in printing.

* * * * * * *

[fol. 1145] Affidavit of W. A. Duncan, omitted in printing.

* * * * * * *

[fol. 1146] EXHIBIT 1 TO AFFIDAVIT OF W. A. DUNCAN

WILLIAM R. STANIFER
Attorney at Law
Tazewell, Tennessee

October 21, 1964

Rec'd. 10/22/64.

Mr. W. A. Duncan
Kentucky Utilities Company
Lexington, Kentucky

Dear Sir:

Enclosed is a certified copy of the minutes of the Town of Tazewell, Tennessee. The minutes of New Tazewell, Tennessee are identical in language.

The Mayors feel that the problem may be worked out if they would meet with the officials of Kentucky Utilities as outlined in our telephone conversation this morning.

Yours truly, William R. Stanifer.

WRS/lg

cc: Mr. Ralph Minor, Jonesville, Virginia.

[fol. 1147] EXHIBIT 2 TO AFFIDAVIT OF W. A. DUNCAN

The Board of Mayor and Aldermen met in Special Session, October 20, 1964. All Members Present Except Alderman McMurray.

I. Meeting called to order by Mayor Hardin.

II. A special meeting of the Council was called by Mayor Hardin to discuss and take whatever action the Council deems necessary on the Municipal Electrical Power System.

III. Motion made by Alderman Smith, and seconded by Alderman Delbert Brooks, that Mayor Hardin be instructed to contact the officials of the Kentucky Utilities Company and make an offer to purchase all of Kentucky Utilities Company's facilities in Tazewell, Tennessee and that this offer to purchase shall be the final offer, and if Kentucky Utilities Company should refuse within ten (10) days from this date to sell their facilities or refuse to negotiate; the Mayor shall be given full authority to proceed to duplicate Kentucky Utilities Company's electrical system, as provided by Title 6, Chapter 13, Tennessee Code Annotated. A vote was ordered, vote taken and Mayor Hardin announced the motion carried and adopted by a unanimous vote.

Meeting adjourned.

I, the undersigned Recorder for the Town of Tazewell hereby certify that the above minutes are a true copy of the minutes of a meeting of the Council for the Town of Tazewell held on the 20th day of October 1964, and are on record in the Recorder's office.

Douglas Quinton, Recorder.

[fol. 1148] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY, Plaintiff,

v.

TENNESSEE VALLEY AUTHORITY, et al., Defendants.

INJUNCTION AND RESTRAINING ORDER—November 5, 1964

The plaintiff, Kentucky Utilities Company (hereafter called KU), having moved the Court pursuant to Rules 62(b) and 62(c) of the Federal Rules of Civil Procedure for an injunction against certain acts pending disposition of its Motion to Amend or Set Aside Findings and Conclusions filed herein, and thereafter during the pendency of any appeal from the final Judgment of this Court herein, and the Court having heard arguments on behalf of the parties and being fully advised, and the Court finding that, if it be finally determined on appeal that KU is entitled to the relief sought in its complaint herein, and if during the pendency of KU's said motion and any such appeal the parties herein enjoined have done those acts herein prohibited, KU would have suffered immediate and irreparable injury, loss and damage for which it would have no adequate remedy at law, and the Court having further found that the granting of the within injunction will not cause undue inconvenience or loss to the defendants but will prevent such immediate and irreparable injury, loss and damage to KU,

Now, Therefore, It Is Hereby Ordered that, pending a ruling by this Court on the plaintiff's said Motion to [fol. 1149] Amend or Set Aside Findings and Conclusions, and thereafter during the pendency of any appeal from the final Judgment of this Court to the United States Court of Appeals for the Sixth Circuit, the defendants, Edward J. Hardin and James B. DeBusk, respectively Mayors of Tazewell and New Tazewell, Tennessee, and their respective

or joint agents, servants, employees and any persons acting in concert with them, be, and all of such persons hereby are, enjoined and restrained from interfering with KU's presently existing written or oral customer contracts and services in the municipalities of Tazewell and New Tazewell, Tennessee, and from removing, disturbing or otherwise interfering with KU's facilities and equipment in such municipalities; and that the defendants, Tennessee Valley Authority (hereafter called TVA), its officers, agents, servants, employees and persons acting in concert with it, be, and they hereby are, enjoined and restrained from selling or delivering to the defendant Powell Valley Electric Cooperative (hereafter called Powell Valley), and that Powell Valley, its officers, agents, servants, employees and persons acting in concert with it be, and they hereby are, enjoined and restrained from purchasing or receiving from TVA, electric power for re-sale, directly or indirectly, in either of the municipalities of Tazewell or New Tazewell, Tennessee, to persons, firms or corporations in such municipalities who on the date of this order are customers of KU at such customers' locations served by KU on the date hereof.

Enter November 5, 1964.

Robert Taylor, Judge.

[fol. 1150] Acknowledgment of service, omitted in printing.

[fol. 1151] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY

v.

TENNESSEE VALLEY AUTHORITY, et al.

ORDER—November 5, 1964

The plaintiff, Kentucky Utilities Company, having made its Motion Pursuant to Rule 52 of the Federal Rules of Civil Procedure that the Court set aside or amend certain findings of fact and conclusions of law contained in the Memorandum Opinion of the Court filed herein on October 15, 1964, and the Court having heard argument on behalf of all parties and being sufficiently advised,

It Is Hereby Ordered That:

1. The sentence in such Memorandum Opinion reading:

> "The two Mayors, and the municipalities which they represent, adopted the contentions made by TVA and in addition they point out that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities."

is withdrawn and, in lieu thereof, the following sentence is hereby substituted:

> "The two Mayors and the municipalities which they represent, adopted the contentions made by TVA and in addition they contend that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities."

2. The paragraph of such Memorandum Opinion reading:

[fol. 1152] "At a meeting with the TVA Board of Directors, the Board advised representatives of Middlesboro, Kentucky and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. This advice was confirmed at a meeting on November 27, 1962, at which time TVA gave representatives of the towns and Powell Valley assurance that the two towns were within the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA would continue to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area."

is withdrawn and, in lieu thereof, the following paragraph is hereby substituted:

"At a meeting with the TVA Board of Directors, on February 4, 1960, the Board advised representatives of Middlesboro, Kentucky and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. At a meeting on November 27, 1962, TVA gave representatives of the towns and Powell Valley assurance that TVA would continue to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area.

3. The paragraph in such Memorandum Opinion reading:

"Both TVA and KU recognized that the territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Committee of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the

primary area where TVA or its distributors had generally established electric service on July 1, 1957."

is withdrawn and, in lieu thereof, the following paragraph is hereby substituted:

"The territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Committees of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the primary area where TVA or its distributors had generally established electric service on July 1, 1957."

4. In all other respects the plaintiff's said motion pursuant to Rule 52 is hereby overruled.

Enter: November 5th, 1964.

Robert Taylor, Judge.

[fol. 1153] Approved as to form:

John A. Rowntree, Counsel for plaintiff. Charles J. McCarthy, Counsel for Tennessee Valley Authority. Clyde Cridler, Counsel for Powell Valley Electric Cooperative. Philip P. Ardery, Counsel for Mayors Hardin and DeBusk.

[fol. 1154] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY, Plaintiff

v.

TENNESSEE VALLEY AUTHORITY, et al, Defendants

NOTICE OF APPEAL—Filed December 31, 1964

To All Defendants and Their Respective Counsel:

You are hereby notified that the plaintiff, Kentucky Utilities Company, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment entered herein on October 21, 1964.

Malcolm Y. Marshall, James S. Welch, Ogden, Robertson & Marshall, 610 E. Taylor Building, Louisville, Kentucky 40202. John A. Rowntree, Fowler, Rowntree & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee. James D. Estep, Jr., Tazewell, Tennessee, Counsel for Plaintiff.

[fol. 1155] Certificate of service, omitted in printing.

[fol. 1156] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Before: O'SULLIVAN and EDWARDS, Circuit Judges and CECIL, Senior Circuit Judge.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 16, 1966

This case is argued by Malcolm Y. Marshall and James S. Welch for plaintiff-appellant, Paul A. Sweeney as amicus curiae for United States, and Philip P. Ardery and Charles J. McCarthy for defendants-appellees and is submitted to the Court.

[fol. 1157] [File endorsement omitted]

No. 16491

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENTUCKY UTILITIES COMPANY, Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, individually, and as Mayor of Tazewell, Tennessee, and JAMES B. DEBUSK, individually, and as Mayor of New Tazewell, Tennessee, Defendants-Appellees.

Decided November 15, 1966.

APPEAL from the U.S. District Court for the Eastern District of Tennessee

Before: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This is an appeal from a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, dismissing a complaint for injunctive relief. Plaintiff-appellant, Kentucky Utilities Company, a Kentucky Corporation (hereafter KU) had sought to have Tennessee Valley Authority (hereafter TVA), Powell Valley Electric Cooperative, a TVA distributor (hereafter PVA), and the respective mayors of the cities of Tazewell and New Tazewell, Ten-
[fol. 1158] nessee, restrained from taking over KU's electric customers in the area of Tazewell and New Tazewell, and generally to restrain TVA and PVA from taking over the supply of electric power to those Tennessee cities.

KU's asserted ground for relief was its claim that it was and had been, before and after July 1, 1957, the primary source of electric power to the consumers in the Tazewells; that in 1963 and prior thereto the municipal authorities of the Tazewells made plans and "conspired" with TVA and PVA to introduce additional TVA power into the area and

had commenced to take over KU's customers; and that all of such plans and conduct were and would be violative of an amendment added in 1959 to the Tennessee Valley Authority Act as Section 15d thereof, (Public Law 86-137; 73 Stat. 280), which in subsection (a) provides that,

> "Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* * * *." (Emphasis supplied.) Title 16 U.S.C.A. § 831n-4(a).[1]

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[1] The 1959 Act authorized TVA to issue and sell bonds in an amount not exceeding $750,000,000 outstanding at any one time, "to assist in financing its power program," but burdened such authority with defined restrictions. We consider that only that portion of the restrictions quoted above is relevant here, but both litigants claim support for their respective positions in the various provisos that follow the quote. We set out the entire restrictions as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square

[fol. 1159] On the critical date, July 1, 1957, KU and PVA were both supplying power in the involved muncipalities, but KU supplied 561 customers out of a total of 589, or 95.3% thereof, PVA serving the remaining 28 customers. In the month of June, 1957, KU supplied 228,087 KWH of electricity out of a total 242,853, or 93.9% thereof, PVA suppling the balance of 14,766 KWH. As found by the District Judge, "On August 6, 1959, the day the Act in question became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell, KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31." It was the contention of KU that the foregoing and other evidence established that the cities of Tazewell and New Tazewell were "outside the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957," and that TVA and PVA were forbidden additional entry into the area.

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miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof."

In defense, TVA and PVA asserted that the basic "area" should not be limited to that part of Tennessee in which KU was the primary source of power, but should encompass that larger portion of Tennessee, including all of Claiborne County, in which TVA and its distributors were [fol. 1160] in total the primary source of power. In Claiborne County, in which the Tazewells were located, two TVA distributors, PVA and the City of LaFollette Electric System, were suppliers. KU also supplied power outside of the Tazewells along a corridor extending into Tennessee from an area of Kentucky wherein KU was also the primary, if not the exclusive, source of power. While PVA and LaFollette Electric System together may have exceeded KU in customers and power delivered, KU was the largest single source of power supply in the whole of Claiborne County. The District Judge found that in Claiborne County:

> "As of July 1, 1957 Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93." 237 F. Supp. at 513.

There was evidence that KU was also the primary source of power in the area of its corridor outside of the Tazewells and that its corridor had a total area of about 60 square miles.

The meritorious issue before the District Judge was whether, as contended by KU, and within the meaning of the 1959 Act, the cities of Tazewell and New Tazewell were outside the area wherein TVA or its distributors were the

primary source of power on July 1, 1957.[2] In addition to [fol. 1161] their defense on the merits, defendants-appellees pleaded that plaintiff lacked standing to maintain the action. The District Judge concluded that plaintiff had standing to sue but held for defendants on the merits. *Kentucky Utilities Company* v. *Tennessee Valley Authority*, 237 F. Supp. 502 (E.D. Tenn. N.D. 1964).

Defendants-appellees reassert here their defense that plaintiff was without standing to sue, and ask that the judgment of dismissal be affirmed on such ground, regardless of the merits. We defer threshold discussion of this question, believing that the reasons which prompt our disposition of it will be more clearly exposed by our consideration of the merits.

We sustain the District Judge's denial of the standing to sue defense, but reverse the judgment which dismissed the cause on the merits.

There is little controversy over the essential and dispositive facts, although the litigant adversaries differ as to their significance. Plaintiff Kentucky Utilities Company is an investor-owned electric public utility, serving customers in about two-thirds of the State of Kentucky in Claiborne County, Tennessee, and through a subsidiary, in four counties in southwest Virginia. Its transmission lines serving this entire area constitute an integrated and continuous system, and all parts of the area served are substantially contiguous. Its Claiborne County, Tennessee, area begins at an area served by it in the State of Kentucky, adjacent to that state's southerly line and then extends along and within a peninsula or corridor into Claiborne County, Tennessee, 15 or so miles to include the cities of Tazewell and New Tazewell. The record before us leaves us uncertain as to the exact width of this corridor and indeed at one point its width and contiguity with the adjoining area may be limited to the dimension of a transmission line at a point where a transmission line of PVA crosses it. This KU corridor is bounded on the east, south and west by TVA

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[2] Plaintiff's complaint also charged all defendants with conspiracy to illegally deprive it of its property in the area in question. The District Judge dismissed this claim and it is not presented by the appeal before us.

distributors and on the north by the main area served by KU itself.

[fol. 1162] KU's activity in the above area began as early as 1919 and from 1920 it has been serving customers in Tazewell and New Tazewell, which localities became incorporated as cities of Claiborne County in 1954. KU has a non-exclusive franchise to provide electricity to customers in all of Claiborne County. The fixed corporate limits of Tazewell and New Tazewell define the area in which KU on July 1, 1957, was the primary source of the electric power consumed therein. Beginning in 1961 and 1962, citizens and officials of Tazewell and New Tazewell were attracted to the apparently lower rates of PVA,[3] which is a distributor of TVA power in adjacent areas and with the few customers in the Tazewells above referred to. After meetings between representatives of these cities and of Claiborne County with TVA and PVA officials, the two towns decided to set up municipal electric systems which would purchase power from PVA at wholesale rates and re-distribute it. The cities' offer to buy the facilities of KU was refused. Activity toward establishing a municipal system then began, but up to the start of this lawsuit this activity consisted of disconnecting KU's line to several of its consumers and reconnecting them to PVA.

This case was started on November 7, 1963, and any activity thereafter by PVA and TVA in the Tazewells has been suspended in obedience to an order of the District Court.

1. *The merits.*

The meritorious and controlling question is whether Tazewell and New Tazewell were "outside the area for which the Corporation [TVA] or its distributors were the primary source of power on July 1, 1957."[4] The litigants'

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[3] KU contends that, properly analyzed, its rates are not less economical to their customers than PVA rates. Resolution of this question, however, is not necessary to our decision.

[4] We need not consider whether, consistent with the 1959 Act, the Tazewells were part of an "additional area extending not more than five miles around the periphery of such

[fol. 1163] pleadings presented issues of fact and law to the District Judge, but as discussed hereinafter we do not consider that there was a real controversy over the basic facts. Decision of the case involves determination of the relevant "area" within which TVA or its distributors constitunted "the primary source of power supply on July 1, 1957." If the relevant area does not include the towns of Tazewell and New Tazewell, then TVA and PVA were, by the 1959 Act, foreclosed from making further contracts for power supply therein. TVA's position that "it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957" is supportable only if it is permited to dilute KU's clear primacy in the Tazewells by detaching them from KU's total and contiguous area of service and making them an integral part of territory in which TVA was dominant. On August 26, 1964, after the issues had been drawn and shortly before trial, the TVA Board of Directors adopted the following resolution:

> "That the Board of Directors hereby finds and determines that all of Claiborne County, Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Numerous maps put in evidence showed that KU's corridor into Tennessee was contiguous to its larger area of service in Kentucky and Virginia which admittedly was no part of TVA's service area. The TVA Board's resolution determined that the *periphery* of its area of primary power supply was along the easterly line of Virginia and the southerly line of Kentucky, thus cutting off KU's corridor of power supply in Tennessee from the balance of its area of service. The Board resolved:

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area as may be necessary to care *for the growth of the corporation and its distributors within said area.*" (Emphasis supplied.) Neither TVA nor PVA contends that taking over the power distribution in the Tazewells is necessary for the growth of TVA within the area contiguous to the Tazewells if the Tazewells are actually outside of the area for which TVA or PVA were the primary source of supply on July 1, 1957.

[fol. 1164] "That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee [Campbell County abuts on Claiborne on the west] is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee."[5]

We consider that the District Judge's conclusion was bottomed primarily upon his acceptance of the TVA resolution as dispositive of the case. His opinion recites:

"The finding of the Board was made in good faith and supported by substantial evidence.

"The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U.S.* v. *Burleson,* 127 F. Supp. 400."

a) Legislative history.

Examination of the legislative history of the 1959 Act has helped our resolution of the question before us. In 1955, TVA was faced with the prospect of rapidly increasing demands for power for its existing customers. It sought a way to meet the cost of new facilities without dependence upon annual national budget considerations. It suggested that Congress give it the power to issue bonds

[5] KU contends that the periphery of the area in which TVA was the primary source of supply should follow the lines which mark the outer limits of such area and in this case it should have dipped down into Tennesse so as to exclude the corridor in which KU was the primary source of power supply.

[fol. 1165] to private and public investors to finance the development. In this effort Senate Bill 2373, 84th Congress, 1st Session (1956) was introduced. This bill contained no territorial limits to the expansion that TVA could accomplish with the proceeds of the bonds. Gabriel O. Wessenauer, Manager of Power for TVA, spoke for it before the Congressional Committees which considered legislation that was proposed. He made it clear that territorial expansion was not contemplated, but that TVA sought power and finances to insure sufficient capacity to accommodate the growth of the system load. *Cf. Hearings, Senate Committee of Public Works,* 84th Congress, 1st Session, S 2373, pp. 65, 79 (1956). The Committee understood this to be TVA's limited objective. Senator Cotton remarked, "Its [TVA's] purpose is to have growth rather than expansion in that you may have more electricity, more power to serve the territory that you presently serve." Id. at 114. At the time this legislation was under consideration, the area served by TVA and its distributors had more or less stabilized; this area comprised all of the State of Tennessee except the peninsula or corridor involved here (and some other areas not of materiality here) as well as parts of Kentucky, Virginia, Georgia, Alabama and Mississippi bordering on Tennessee. The history of troubles and collisions between TVA and private power companies was of course known to Congress, but a degree of repose had existed for some time. Congress, as the source of money, had exercised power over TVA's geographic growth, but possession by TVA of authority for self-financing might indeed call for substitute controls upon its expansion. S 2373 was never passed, and two years later, in 1958, two new bills, HR 3236 and HR 4266, 85th Congress, 1st Session, were proposed. These bills also made no provision for any territorial limitations. This was a cause of concern to some members of Congress. A typical inquiry was, "Can the TVA Directors issue bonds to expand its area outside of the district now covered by TVA?" An answer was made, "* * * there has not been a single instance in the history of this Committee in which the Tennessee Valley Authority has gone in to 'raid' any utility's territory." [fol. 1166] *Hearings, House Committee on Public Works,* 85th Cong. 1st Sess., HR 3236 and HR 4266, p. 16 (1958).

TVA's Wessenauer added "We have not run any parallel lines for 10 to 20 years." *Id.* at 94. A statement by a representative of the private power companies that the bill posed the "threat of geographic as well as capacity expansion" was dismissed by a supporter of the bill as the raising of an old "bogey." *Id.* at 156-159.

After the above bills failed of enactment, four new ones were introduced into the Senate: S 1855 which proposed to limit TVA to its "service area" as of July 1, 1957; S 1869 which merely required TVA to allow Congress 60 days to veto any proposed expansion before beginning it; S 1986 which would have limited TVA to replacing existing facilities; and S 2145 which would have required congressional approval for any expansion. Although none of these bills became law, it had become apparent that definition and imposition of some limitation on TVA growth was going to have to be a part of any successful bill.

In 1959, H.R. 3460, which ultimately became the 1959 TVA Act, was introduced. As offered, this bill would have limited TVA to "counties lying in whole or in part within either the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957." During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accom-odations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *cf Hearings, Senate Committee on Public Works,* 86th Cong., 1st Sess., S 931 and H.R. 3460 pp. 39-51 (1959); be-
[fol. 1167] tween the Georgia Power Co. and TVA, *Id.* at 220, and indeed in our own case between KU and PVA.[6]

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[6] In 1958 a written agreement was made between KU and TVA's distributor, PVA. Fairly read, this agreement provided that KU and PVA would mutually avoid "raiding" customers in their respective areas. To insure understanding and delineation of such areas, engineer repre-

Rep. Vinson stated that his amendment "writes into the law the 'gentlemen's agreement.'" *Hearings,* 86th Cong., 1st Sess., *House Committee on Public Works,* H.R. 3460, p. 111 (1959).

Three months later, H.R. 3460 was before the Senate Committee, together with S 931, a bill which more or less conformed to the version of H.R. 3460 originally submitted to the House Committee. The threat of possible expansion of TVA under S 931 excited numerous and vigorous protestations from representatives of power companies, whose statements consume some 70 pages of the report. *Senate Committee on Public Works,* 86th Cong., 1st Session, S 931 and H.R. 3460, pp. 170-240 (1959). Ultimately, S 931 was rejected, and H.R. 3460 was reported out and passed.

In the Senate report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:

> "Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stabilization area should be defined and limited by law.*" *U.S. Code Cong. and Adm. News,* 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis supplied.)

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sentatives of KU and PVA collaborated in the preparation of a map which, upon its completion in 1960, showed the Tazewells as part of the territory in which KU was the primary source of power. After the activity to have additional TVA power brought into the Tazewells, PVA gave notice of termination of its 1958 agreement with KU. With reference to some new projects then contemplated for the Tazewells, a TVA District Manager, on October 18, 1962, recited in a memorandum to TVA's Director of Power Marketing that "Under the territorial agreement between the Cooperative [PVA] and KU, effective January 16, 1958, *both of these projects are in KU's territory.*" (Emphasis supplied.)

[fol. 1168] The "others" were those who supported the Vinson Amendment which become a part of the bill.

From all of this it is apparent that Congress intended that in exchange for the free hand it was giving TVA in financing further development, it required that such development was to be kept within "the area for which [it] * * * or its distributors were the primary source of power supply on July 1, 1957." The language of Congress was clear and the "area" to which TVA was to be confined was ascertainable from conditions which existed on the critical date of July 1, 1957.

But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts "for the sale or delivery of power."

The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to a finding of fact, we consider that it was clearly erroneous. Fed. R. Civ. P. 52(a).

TVA argues that because several maps purporting to disclose the area of its service, which it furnished to the Congressional Committees considering the legislation, showed all of Claiborne County as within said area and did not disclose KU's corridor into Tennessee, it should be assumed that Congress by its Act made all of the County [fol. 1169] a part of "the area" of TVA. On trial, however, TVA's witnesses conceded that these maps were intended to be only "rough approximations" of its total

area. The evidence disclosed that they failed to portray the numerous places where peninsulas or corridors contiguous to and parts of non-TVA areas intruded across the perimeter of and into the area portrayed as being exclusively that of TVA.

b) Other evidence indicating the area of TVA-supplied power.

We have detailed above undisputed evidence that KU's corridor which included the Tazewells was contiguous to an area of Kentucky in which KU was not only the primary but the exclusive source of power supply. This was also confirmed by maps annually prepared by TVA to portray its "Transmission System." These maps covered years prior and subsequent to 1957, and subsequent to the effective date of the 1959 Act. In each of these maps, the KU corridor was shown as a continuation of KU's area in Kentucky and not as part of TVA's area. The corridor's boundaries and outline were not precisely delineated and New Tazewell was not shown as within the intruding corridor, but it is not claimed that New Tazewell was in fact outside the corridor. There was also in evidence a detailed map prepared in 1960 by the joint work of engineers for KU and PVA (the "Rowe-Osborne" map) which precisely delineated the line which separated the respective areas of these utilities. The Tazewells were within KU's area which extended north to the Tennessee-Kentucky line and the Tennessee-Virginia line. On the Tennessee side of the Kentucky-Tennessee line are Cumberland Gap and other municipalities in which KU was the exclusive source of power. The TVA Board resolution, however, determined that the "periphery" of TVA's area was along the northerly line of Claiborne County which is the Kentucky-Tennessee state line—this notwithstanding that the area in which KU was either the exclusive or primary source of [fol. 1170] electric power lay on both sides of the "periphery" adopted by its Board. Thus the Board "lopped off" from KU's area its corridor extending into Claiborne County and resolved that all of Claiborne County, including the Tazewells, was part of "the area" in which TVA was the primary source of electric power.

Among the map exhibits was one prepared by TVA in

1952 and delivered to KU's power engineers with a letter from one DeMerit, TVA's Chief Power Engineer. The letter described the map as "showing the areas now served by the LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the *Cumberland Gap-Tazewell Section of Tennessee.*" (Emphasis supplied.) The map, Exhibit 36, shows the KU corridor extending without break and with substantial width from KU's area in Kentucky and Virginia southerly to and including the Tazewells.[6a]

It appears to us that except for the maps presented to the Congressional Committees as "rough approximations," the maps prepared by TVA engineers, or in the making of which they collaborated, and the physical facts could be consistent only with a finding that the Tazewells on July 1, 1957, were outside of an area in which TVA was the primary source of power. We are persuaded also that TVA's "rough approximation" maps were not intended to deal specifically with KU's relatively small peninsula extending as a part of its total area into Tennessee. Until about 1960 when the activity to have TVA take over the supply of power to the Tazewells commenced, all of TVA's own activities were consistent only with the conclusion we have reached. Its Board's resolution, adopted to sustain its position in this lawsuit. could not change the facts.

[fol. 1171] We should make clear that we are not deciding whether the involved 1959 Act would forbid TVA from entering into or expanding its service within areas served by private utilities where such areas are but islands within a larger area in which TVA is primary. Tazewell and New Tazewell are not such islands, but are attached to the "mainland" of KU's area of primary service. The fact that a line or lines of PVA may at one or more points enter into this corridor or, as the evidence shows, at one point cross one of KU's transmission lines, does not make islands of

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[6a] This is the same Exhibit 36 which is attached to the dissent. The dissent asserts that it portrays "KU's view of the same problem * * *." This is true, but as pointed out in the above text, this map was the production, not of KU engineers, but was made by *TVA* engineers to show *their* view of the areas served by the respective utilities.

Tazewell and New Tazewell. We do not consider that the District Judge's recitation that:

> "KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell."

was a finding of fact that the Tazewells were "islands."

There was evidence that it would be economically advantageous to consumers in the Tazewells to receive their power from TVA, either directly from PVA or through municipally owned systems. Whether TVA is in good faith seeking to help the citizens of Tazewell and New Tazewell obtain the benefits which flow from TVA is an irrelevant question here. We hold that the 1959 Act now forbids the involved expansion of TVA.

c) Reviewability of TVA Board's determination.

Appellees assert that the District Judge made his own finding of fact on the critical issue, independently of the TVA Board's finding, and that under 52(a) Fed. R. Civ. P., such finding binds us, absent a valid conclusion by us that his finding of fact was clearly erroneous. We read the [fol. 1172] District Court opinion, however, as accepting the TVA Board's resolution as dispositive of the case, but if his decision in total amounts to a finding of fact, we consider it erroneous within the meaning of the mentioned rule.

As an alternative position, TVA contends that the 1964 resolution of its Board of Directors, made for the purpose of and on the eve of trial, was beyond judicial review. It is clear that such resolution was the product of advice provided by memoranda presented by TVA's Manager of Power, Mr. Wessenauer, and its General Counsel. The "rough approximation" maps which Wessenauer had presented to the Congressional Committee accompanied his memorandum. He advised the Board:

"The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the entire area served by TVA power would justify the time and expense involved in making the necessary studies."

With reference to his Congressional Committee maps, he said:

"The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA."

The General Counsel's memorandum included the following:

"The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA Act [fol. 1173] is a responsibility which Congress has placed on the TVA Board.

* * * * * * *

"The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

"A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip

down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957,[7] and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell Counties."

Appellees support their argument on this point by citing cases which hold that where Congress has committed to a government agency the responsibility for making determinations preliminary to executive or administrative action, such determinations are beyond judicial review. We, however, do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the [fol. 1174] primary source of power supply on July 1, 1957." Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board. If, in fact, the Tazewells were outside the area where TVA was primary, a contrary resolution by the TVA Board could not change the fact.

Leading cases supporting the doctrine invoked by appellees are *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958); *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. Ed. 559 (1840); *United States* v. *Black*, 32 L. Ed. 354 (1888); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 84 L. Ed. 1108 (1940). We will not attempt review of these and other cases cited, other than to observe that they involved the responsibility

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[7] H.R. 3460, as originally presented, indicated an intention to use *counties* as the area within which to determine the controlling service area. But such language was eliminated in the final draft.

and right of executive and administrative agencies to make determinations essential to the exercise of granted power. The portion of the 1959 statute before us gave TVA authority to finance its development by issuance of bonds, but imposed specific restraints upon the future activities of TVA. We consider that the language of restraint was clear and did not need interpretation, discretionary or otherwise. Enforcement of the restraint is a judicial function. *Stark* v. *Wickard,* 321 U.S. 288, 309-310 (1944); *Peters* v. *Hobby,* 349 U.S. 331, 345 (1955); *Leedam* v. *Kyne,* 358 U.S. 184, 188 (1958). The District Judge did hold that the finding of the TVA Board was subject to his review and nothwithstanding his reliance on the Board's resolution said:

> "It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U.S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra,* [252 F(2) 537, (CA 6, 1958) *cert. den.* 358 U.S. 830] *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316."

We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this appeal.

[fol. 1175] 2. *KU's standing to sue.*

KU does not have an exclusive franchise and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area. We are satisfied that the Act's restrictions on TVA expansion were incorporated to protect KU and other established utilities from the destructive consequences of intrusion of TVA power into areas where such utilities had already been established as the primary source of power and which areas were "outside" of TVA's primary area.

The Senate Committee's report reviewing the plan and purpose of H.R. 3460, the bill enacted, recited that among other objectives of its Territorial Limitation was a purpose

to "protect the areas now being served by private utilities." *U.S. Code Congressional and Administrative News*, 86th Congress, 1st Session, p. 2008 (1959). Remarks made by members of Congress make clear that concern for the rights of KU and other utilities in like situations prompted the limitations placed on TVA. Such being so, we believe that the courts are open to KU to seek protection of the rights which Congress created for it.

Of the cases relied on by appellees on the question of plaintiff's standing to sue, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L. Ed. 374 (1938); *Tennessee Electric Power Company* v. *TVA*, 306 U.S. 118, 83 L. Ed. 543 (1939); and *Kansas City Power & Light Company* v. *McKay*, 225 F(2) 924 (CA D.C. 1955) *cert. den.*, 350 U.S. 884, speak most directly to the subject. All of them involve efforts by private utilities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue and the asserted ground for relief [fol. 1176] in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means whereby competitors of private utilities had or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds. Without attempting detailed analysis of the facts of each of these cases and the court's reasoning, we recite language from *Tennessee Electric* which we believe most nearly expresses the theory underlying all three of the cases. Speaking of the plaintiff's assertions, Justice Roberts said:

> "This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in

> damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution."

and Justice Roberts then concludes that "[t]he contention is foreclosed by prior decisions that the damage consequent on competition, *otherwise lawful*, is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." 306 U.S. 139, 140, 83 L. Ed. 550, 551. (Emphasis supplied.)

[fol. 1177] Relying upon these principles, TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and, therefore, it is no business of KU where these municipal systems obtain their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit.

No precedent answers this question precisely, but we believe that there is ample authority for our affirmance of the District Judge's view that plaintiff had standing to sue. In *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F(2) 537, 544 (CA 6, 1958), where the plaintiff bank charged violation of federal and state statutes by the Comptroller of the Currency's grant of authority to open a branch bank, we said:

> "As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes * * *. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In *Stark* v. *Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944) standing to sue the Secretary of Agriculture by a milk producer who asserted that the Secretary's action offended a statute creating rights in plaintiff was sustained by the Supreme Court which said:

> "Here, there is no forum, other than the ordinary courts, to hear this complaint. When * * * definite personal rights are created by federal statute, similar [fol. 1178] in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * *. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States* v. *Morgan*, 307 U.S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S.Ct. 795." 321 U.S. at 309-310, 88 L. Ed. at 747-748.

In *Leedom* v. *Kyne*, 358 U.S. 184 (1958) dealing with and sustaining a District Court's jurisdiction to hear a complaint which charged the NLRB with illegall conduct, the Supreme Court said:

> "This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. 188

See also, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Texas & P. R. Co.* v. *Rigsby*, 241 U.S. 33, 39-40, 60 L. Ed. 874, 877 (1916). It would be useless for Congress to include distinct limitations upon the expansion plans of such public

corporations as TVA if there was no way to force them to keep within such limitations.

We hold that KU had standing to sue and on the merits should have been accorded appropriate relief. This dis- [fol. 1179] position makes it unnecessary that we consider other contentions made by KU in support of its claim for relief.

Judgment of dismissal is reversed and the cause is remanded for further proceedings consistent herewith.

EDWARDS, Circuit Judge, dissenting. The majority opinion would in my view construe statutory restrictions in the 1959 Tennessee Valley Authority Act, 73 Stat. 280 (1959), 16 U.S.C. § 831n-4 (1964), much more narrowly than it appears to me Congress intended. The Tennessee Valley Authority sought authority from Congress to issue revenue bonds to expand its facilities for furnishing electric power within the general area served by TVA. The bill proposed by TVA was opposed vigorously by privately owned power companies whose service areas impinged upon TVA's. As a result of this opposition, when the 1959 TVA Act was passed, it contained language generally restricting the areas which TVA could supply to those which it was serving as the primary source of power on July 1, 1957, and to an area no more than five miles outside the perimeter of such area.

The limiting provision follows:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside *the area* for which the Corporation or its distributors were the *primary source of power supply on July 1, 1957*, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided

further, That no part of such additional area may be [fol. 1180] in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act. . . ." (Emphasis supplied.) 73 Stat. 280 (1959), 16 U.S.C. 831n-4(a) (1964).

This action is a suit for an injunction by Kentucky Utilities Company against TVA seeking to restrain it from providing electric power to two municipal electric distribution systems in the towns of Tazewell and New Tazewell, Tennessee. The two major parties agree only on the fact that legal construction is needed for the words "area" and "primary source of power" in the first clause of the portion of 16 U.S.C. § 831n-4, the 1959 TVA Act which we have quoted.

Briefly put, it is the contention of KU that its area of service reaches down from Kentucky into Claiborne County, Tennessee, in a narrow peninsula of service along its transmission line, and that it represented the primary source of power supply on July 1, 1957, for the towns of Tazewell and New Tazewell, Tennessee.

Briefly put also, TVA's position is that TVA's power lines, through its subsidiary, Powell Valley Electric Cooperative, criss-crossed all of Claiborne County on the crucial date of July 1, 1957, and served a portion of the Tazewells and plainly, in TVA's contention, represented the primary source of power for Claiborne County.

[fol. 1181] TVA also points out factually that its transmission line of Powell Valley cut across KU's transmission line rendering KU's Tazewell facilities an island.

TVA's view of the "area" concerned in this matter is

portrayed by its Exhibit 91. (Attached hereto following page 27.)

KU's view of the same problem is dramatically different, as shown in Exhibit 36. (Attached hereto following page 27.)

Although it seems unlikely, both exhibits refer to the same dispute and to the same general geographical locality.

It is clear, as the District Judge who heard this case found, that TVA was the dominant supplier of electric power in Claiborne County while KU was the dominant supplier of electric power within the city limits of Tazewell and New Tazewell.[1]

It is also clear that neither of these utilities had any exclusive franchise to serve any territory here in dispute. It is also clear that KU had many customers in Claiborne County, while TVA had customers in both Tazewell and New Tazewell on the critical date.

After an interesting review of the Congressional history of the 1959 TVA Act, Judge Taylor concluded:

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[1] "As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

"On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service." (Quoted from Trial Judge's Memorandum Opinion, Appellant's Appendix at p. 49a-50a.)

[fol. 1182] "The TVA Board of Directors on August 26, 1964 made an official and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.

"The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

"The finding of the Board was made in good faith and supported by substantial evidence.

"The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U.S.* v. *Burleson*, 127 F. Supp. 400.

"None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its contact with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

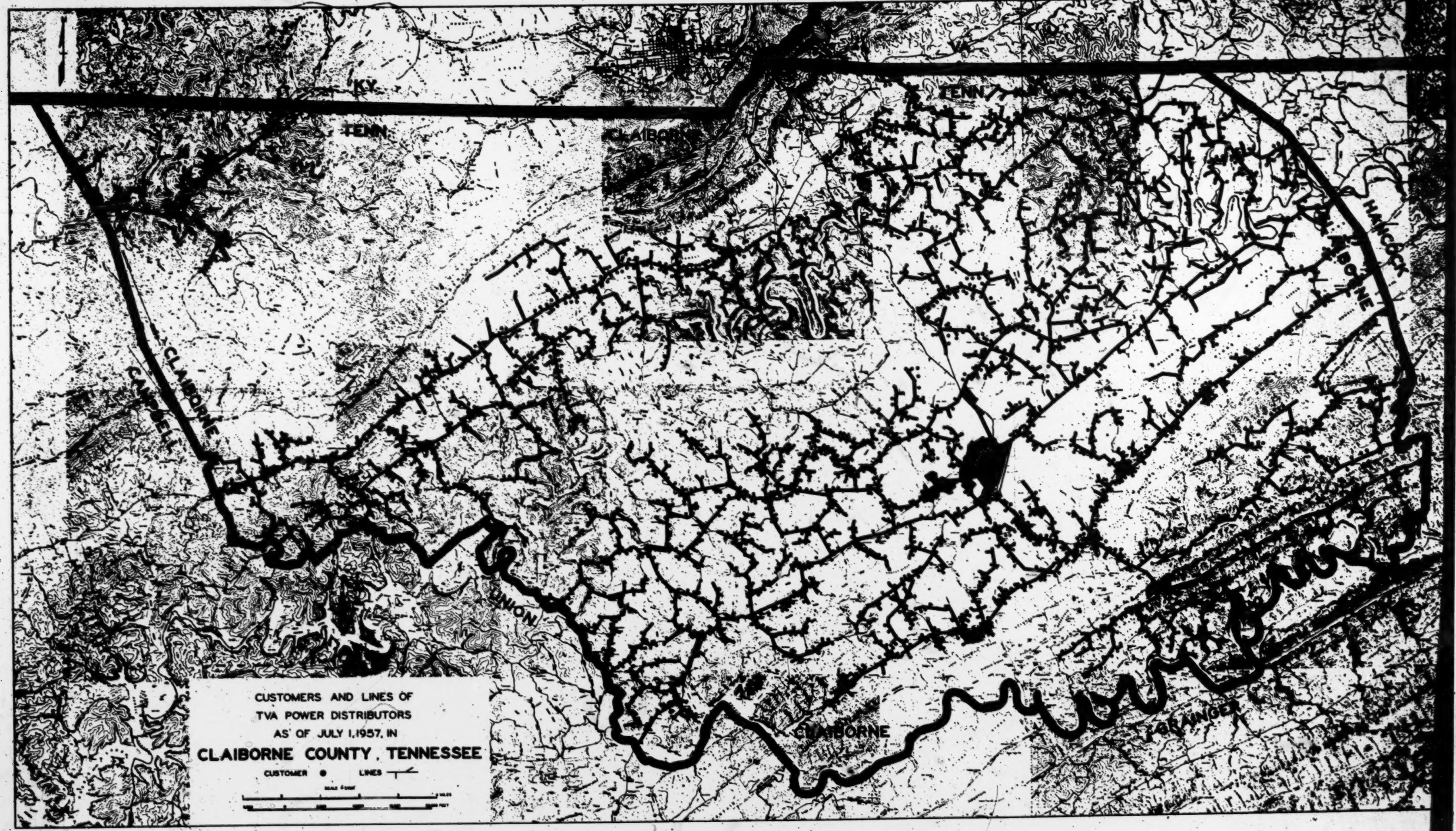
"It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint."

The maps to which Judge Taylor refers are before this court. They were before Congress when it passed the disputed legislation. Tazewell and New Tazewell are clearly within both the Tennessee watershed and the perimeter of the TVA service area as it was outlined to Congress. In these cities on July 1, 1957, no private utility had any ex- [fol. 1183] clusive franchise, and in fact, TVA was then furnishing power to customers. In addition, the cities are located in a county where TVA clearly was the primary

source of power on July 1, 1957. Under this set of facts, I do not see how we can properly interpret the 1959 TVA Act as making illegal a finding of fact by the Board of TVA that it was "the primary source of power" for "the area" concerned on July 1, 1957. The 1959 TVA Act and its relevant amendments seem to me to support TVA authority to make this finding. (73 Stat. 280 (1959), 16 U.S.C. 831 (1964). See in particular 16 U.S.C. 831i and 16 U.S.C. 831h-4). Judge Taylor so interpreted the Act and found "substantial evidence" to support the crucial finding.

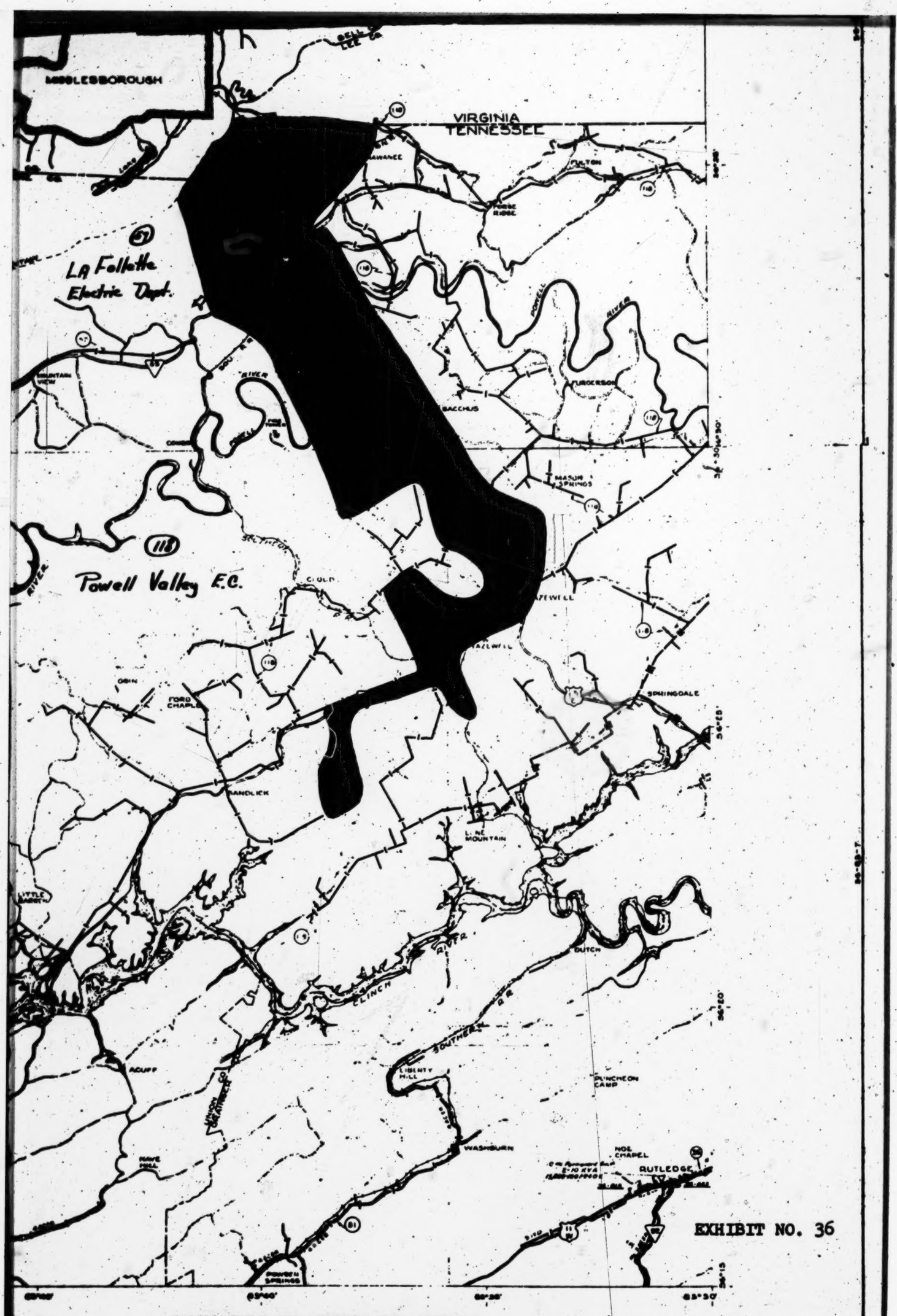
I believe that Judge Taylor's interpretation and application of the statutory language represents both logical construction of the statutory language and compliance with Congressional intent.

I concur with my brothers' view that the 1959 TVA Act should be construed as giving KU standing to bring this suit, but I would affirm the District Judge's order dismissing same for the reasons given above and in his complete opinion.



Map of Claiborne County, Tennessee, showing customers and

Exhibit N


MIDDLESBOROUGH
VIRGINIA
TENNESSEE
LA Follette Electric Dept.
Powell Valley E.C.
CLAIBORNE
UNION
GRAINGER
CAMPBELL
CLINCH
POWELL
RIVER
TAZEWELL
SPRINGDALE
WASHBURN
RUTLEDGE
DUTCH
LIBERTY HILL
LINE MOUNTAIN
SANDLICK
ACUFF
BACCHUS
MASON SPRINGS
LITTLE BARREN
SOUTHERN RY.
EXHIBIT NO. 36
COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA
APPALACHIAN ELECTRIC COOPERATIVE
KNOXVILLE ELECTRIC POWER AND WATER BOARD
LA FOLLETTE ELECTRIC DEPT.
POWELL VALLEY ELECTRIC COOPERATIVE
TENNESSEE VALLEY AUTHORITY
DEPARTMENT OF OPERATIONS
TRANSMISSION AND RURAL DISTRIBUTION LINES IN CAMPBELL, CLAIBORNE, UNION AND GRAINGER COUNTIES, TENNESSEE

[fol. 1187] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16,491

KENTUCKY UTILITIES COMPANY, Plaintiff-Appellant,

vs.

TENNESSEE VALLEY AUTHORITY; POWELL VALLEY ELECTRIC COOPERATIVE; EDWARD J. HARDIN, INDIVIDUALLY AND AS MAYOR OF TAZEWELL, TENNESSEE; JAMES B. DEBUSK, INDIVIDUALLY AND AS MAYOR OF NEW TAZEWELL, TENNESSEE. Defendants-Appellees.

Before: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT—Filed November 15, 1966

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof, It is nowhere ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss, Clerk.

Issued as Mandate:

[fol. 1188] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1189] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 962

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, et al., Petitioners,

v.

KENTUCKY UTILITIES COMPANY

ORDER ALLOWING CERTIORARI—March 27, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with Nos. 1056 and 1063 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1190] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 1056

POWELL VALLEY ELECTRIC COOPERATIVE, Petitioner,

v.

KENTUCKY UTILITIES COMPANY

ORDER ALLOWING CERTIORARI—March 27, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with Nos. 962 and 1063 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1191] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 1063

TENNESSEE VALLEY AUTHORITY, Petitioner,

v.

KENTUCKY UTILITIES COMPANY

ORDER ALLOWING CERTIORARI—March 27, 1967

The petition herein for a write of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with Nos. 962 and 1056 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

Exhibit Volume II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 49

EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, ET AL., PETITIONERS,

vs.

KENTUCKY UTILITIES COMPANY

No. 50

POWELL VALLEY ELECTRIC COOPERATIVE, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY

No. 51

TENNESSEE VALLEY AUTHORITY, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 11, 1967

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1967

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1967

CERTIORARI GRANTED MARCH 27, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 40

EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, ET AL., PETITIONERS,

vs.

KENTUCKY UTILITIES COMPANY

No. 50

POWELL VALLEY ELECTRIC COOPERATIVE, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY.

No. 51

TENNESSEE VALLEY AUTHORITY, PETITIONER,

vs.

KENTUCKY UTILITIES COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EXHIBIT VOLUME II

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	Original	Print
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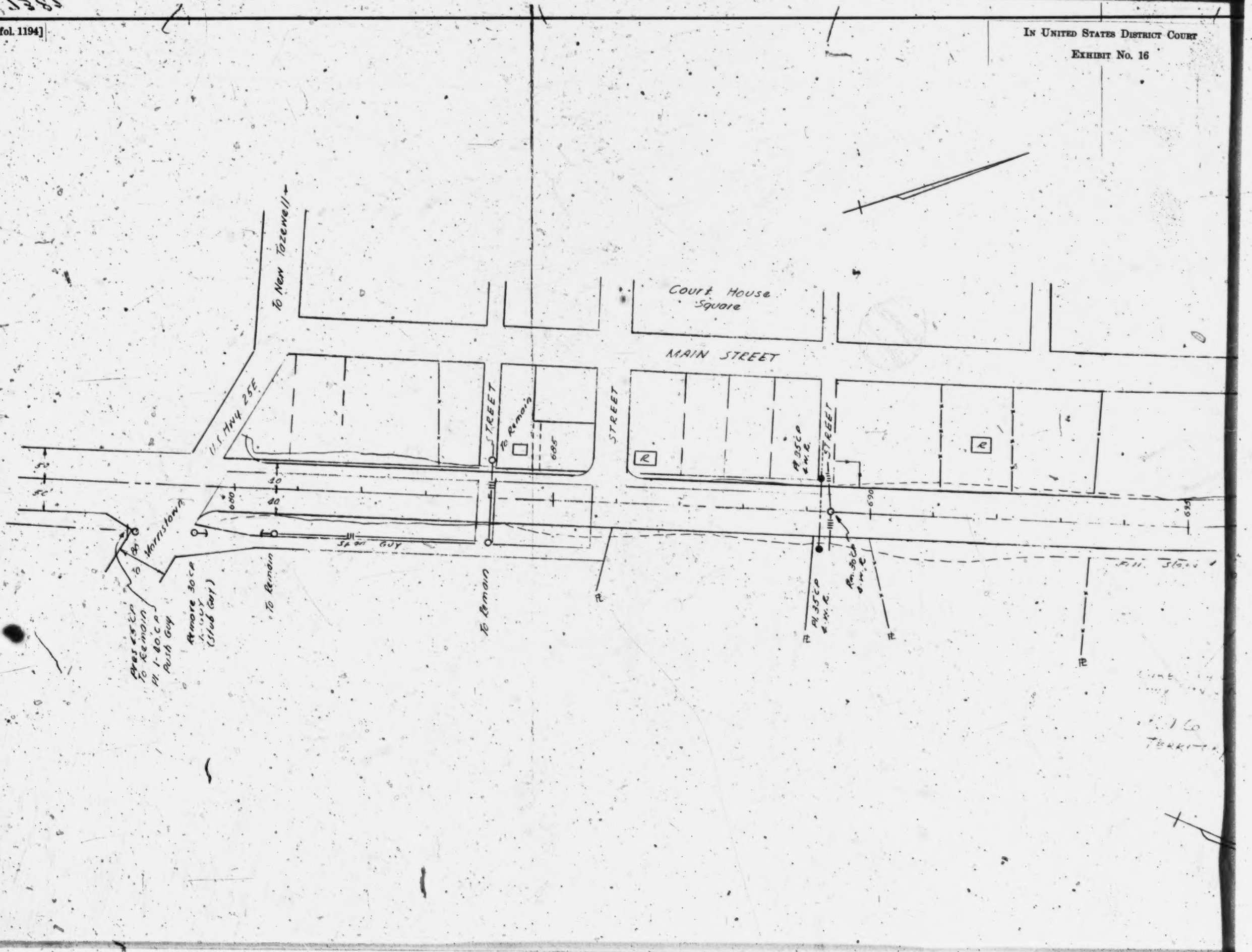
	Original	Print
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1385

[fol. 1194]

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 16



	Original	Print
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Record from the United States District Court for the Eastern District of Tennessee, Northern Division—Continued

EXHIBITS TO DEPOSITION OF RALPH B. MINER—Continued

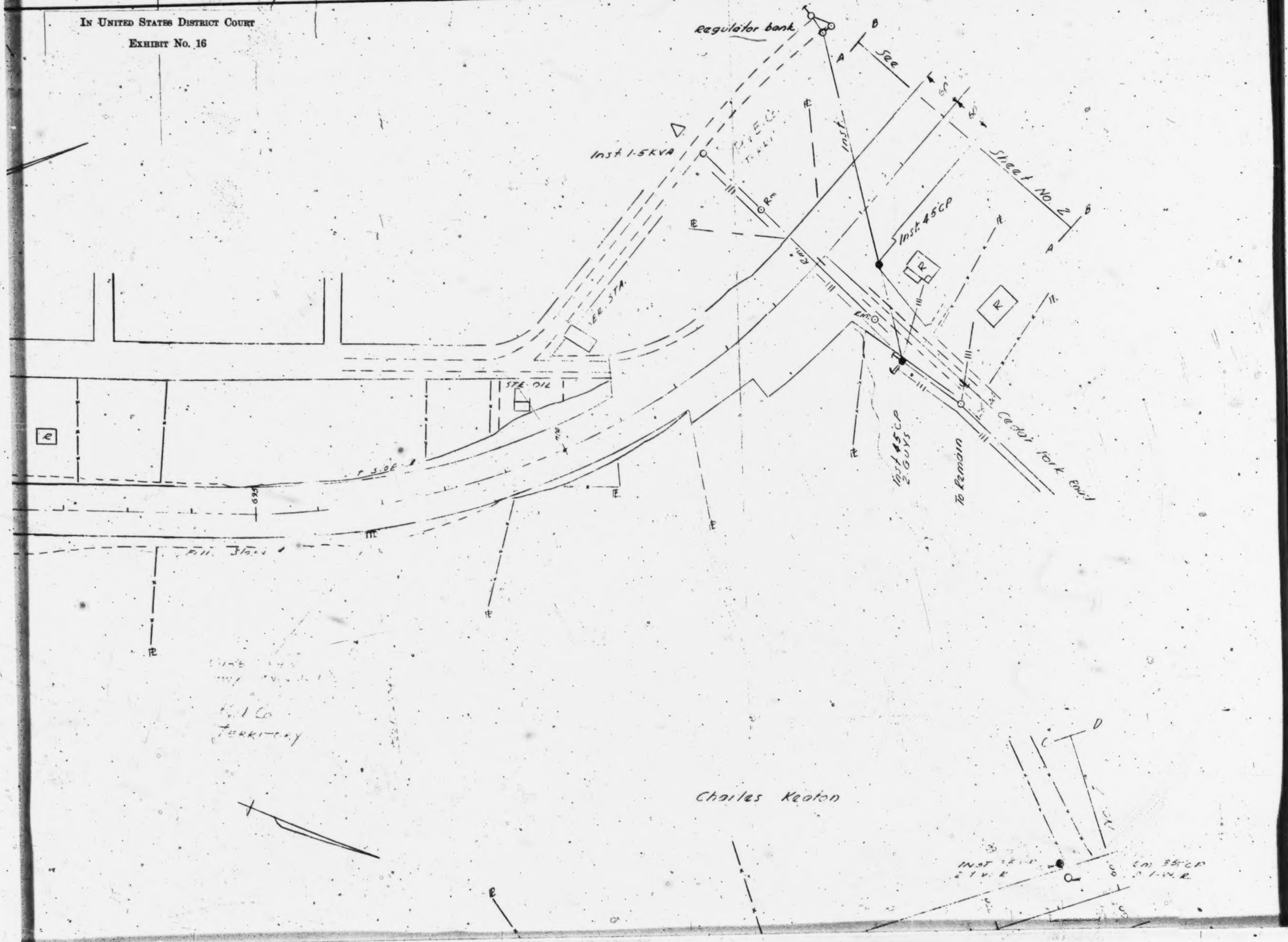
	Original	Print
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IN UNITED STATES DISTRICT COURT

EXHIBIT No. 16



[fol. 1192] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 13

WESTERN UNION
Telegram

W. P. Marshall, President

The filing time shown in the date line on domestic telegrams is Local Time at point of origin. Time of receipt is Local Time at point of destination.

125P EST NOV 6 63 CTA256
CT MRA012 PD NEW TAZEWELL TENN 6 100P EST
KENTUCKY UTILITIES
LEXINGTON KY

AS YOU KNOW WE HAVE COMMENCED CONSTRUCTION OF A MUNICIPAL POWER SYSTEM IN TAZEWELL AND NEW TAZEWELL TENN WE WOULD APPRECIATE PROMPT REMOVAL OF YOUR DUPLICATED FACILITIES AS THE CONSTRUCTION PROGRESSES

E J HARDIN 111 MAYOR OF TAZEWELL AND BILL DEBUSK MAYOR OF NEW TAZEWELL

(13).

Morristown

Res. 35 C.P. To Remain W. 1-80 C.P. Pub. Guy

Armore 30 C.P. 1 Guy (Club Guy)

To Remain

To Remain

St. on Guy

Fill. Stone

Pl. 35 C.P. E.W.C.

Res. 30 C.P. E.W.C.

Edith Ivy

No. 2

See Sheet

James Greever

Reuben Rowland

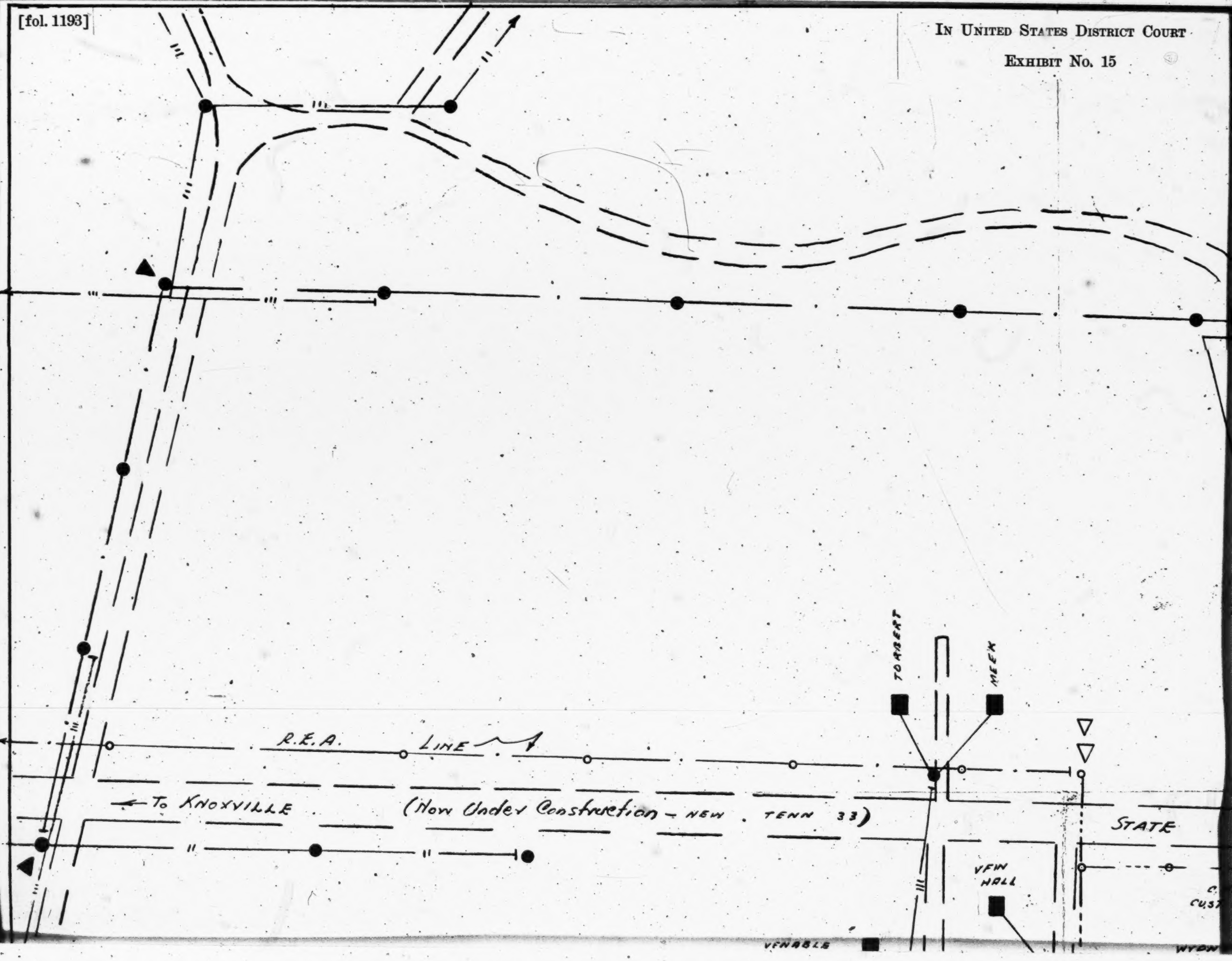
J. C. Rowland

Chas. Brooks

[fol. 1193]

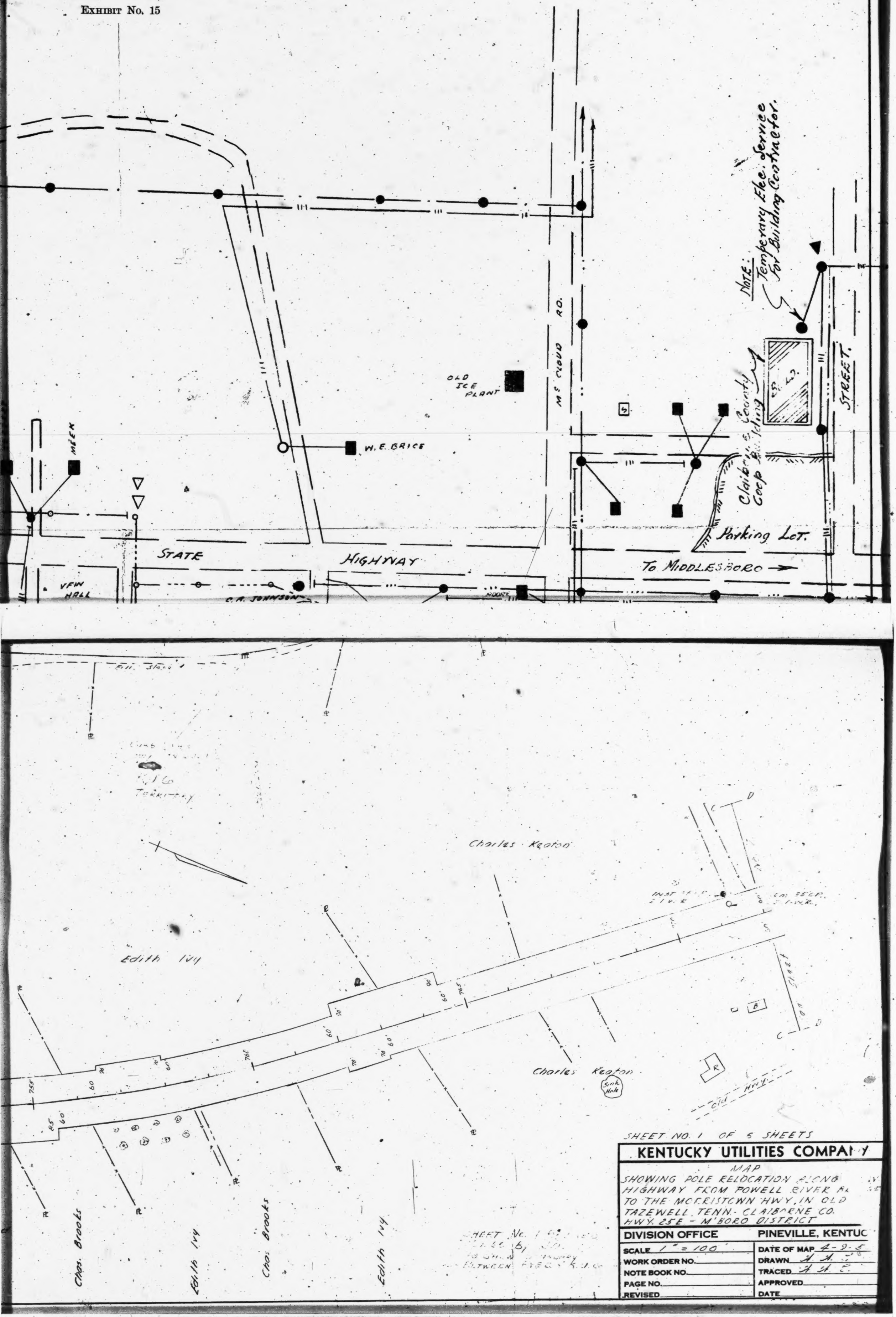
IN UNITED STATES DISTRICT COURT

EXHIBIT No. 15



IN UNITED STATES DISTRICT COURT

EXHIBIT No. 15



SHEET NO. 1 OF 5 SHEETS

KENTUCKY UTILITIES COMPANY	
MAP SHOWING POLE RELOCATION ALONG HIGHWAY FROM POWELL RIVER BR. TO THE MORRISTOWN HWY. IN OLD TAZEWELL, TENN. - CLAIBORNE CO. HWY. 25E - M'BORO DISTRICT	
DIVISION OFFICE	PINEVILLE, KENTUC
SCALE 1" = 100'	DATE OF MAP 4-9-5
WORK ORDER NO.	DRAWN
NOTE BOOK NO.	TRACED
PAGE NO.	APPROVED
REVISED	DATE

R.E.A. LINE

← TO KNOXVILLE

(Now Under Construction - NEW . TENN 33)

TO CUMBERLAND GAP

TORBERT

MEEK

STATE

VFW HALL

VENABLE

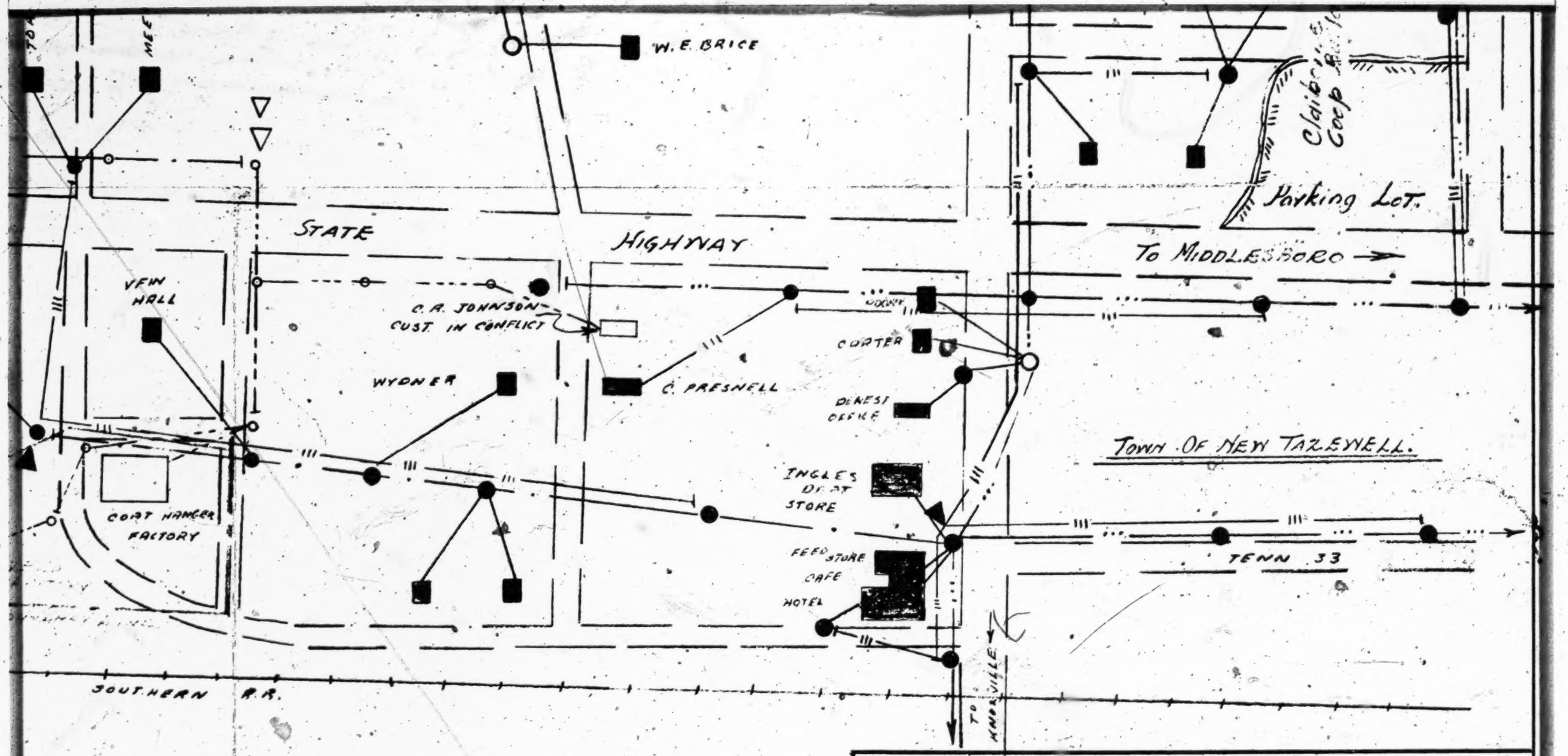
COAT HANGER FACTORY

JAMES MOORE

SOUTHERN R.R.

LEGEND

- ○ O.P.&L. POLES
- ○ POWELL VALLEY R.E.A. POLES
- ▲ O.P.&L. TRANSFORMERS
- △ POWELL VALLEY R.E.A. TRANSFORMERS
- ▬ O.P.&L. CUSTOMERS
- ▭ POWELL VALLEY R.E.A. CUSTOMERS



KENTUCKY UTILITIES COMPANY

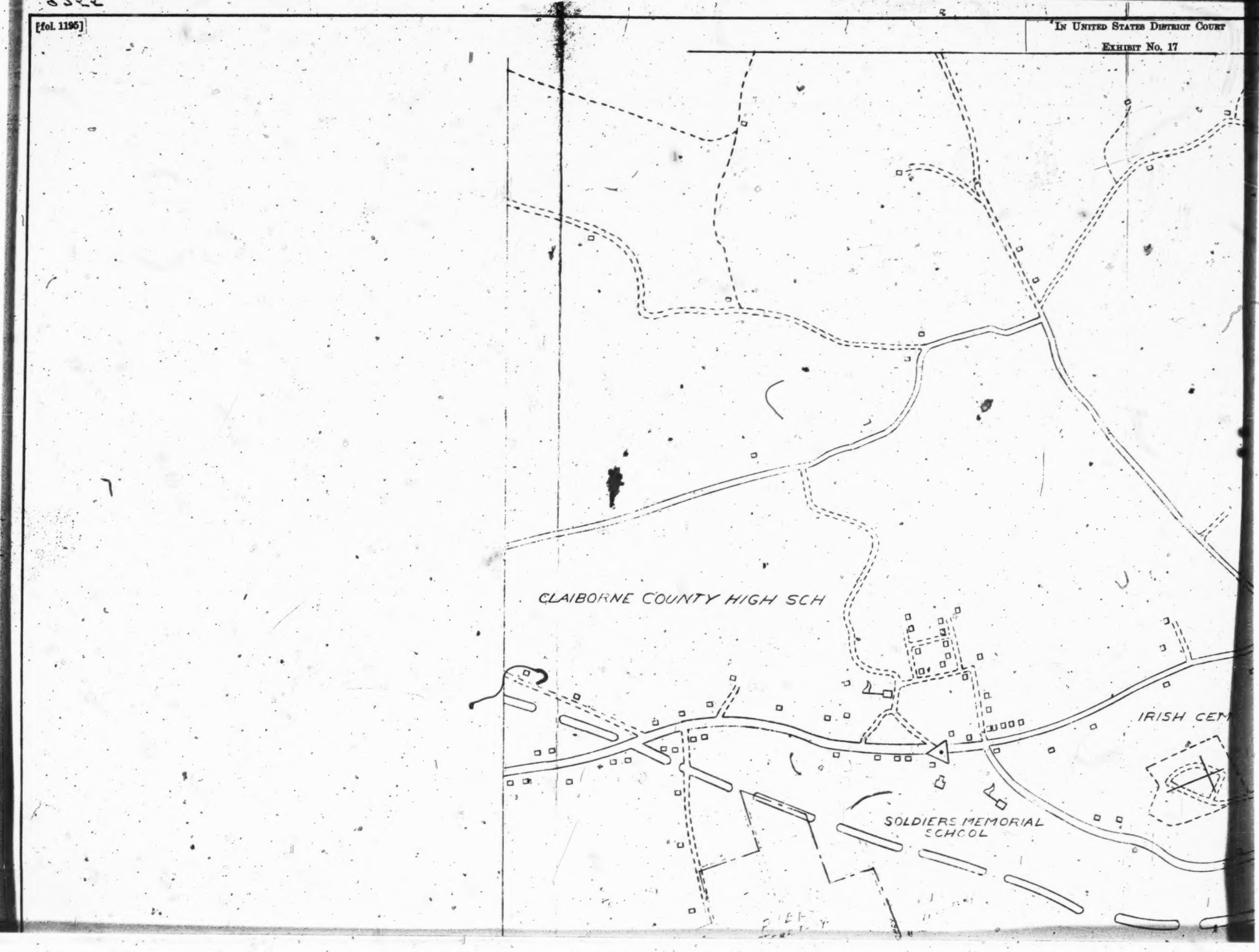
SKETCH SHOWING CONFLICT BETWEEN D.P.C.L. CO. & POWELL VALLEY R.E.A. IN NEW TAZEWELL TENN.

DIVISION OFFICE	PINEVILLE, KENTUCKY
SCALE 1"=100'	DATE OF MAP 6-24-52
WORK ORDER NO.	DRAWN HLD
NOTE BOOK NO.	TRACED HLD
PAGE NO. FIELD SKETCH	APPROVED
REVISED	DATE 6-25-52 8185

[fol. 1195]

In United States District Court

Exhibit No. 17



LOVE CEM

ER [illegible] CEM

TAZEWELL

IRISH CEM

RS MEMORIAL
CHOOL

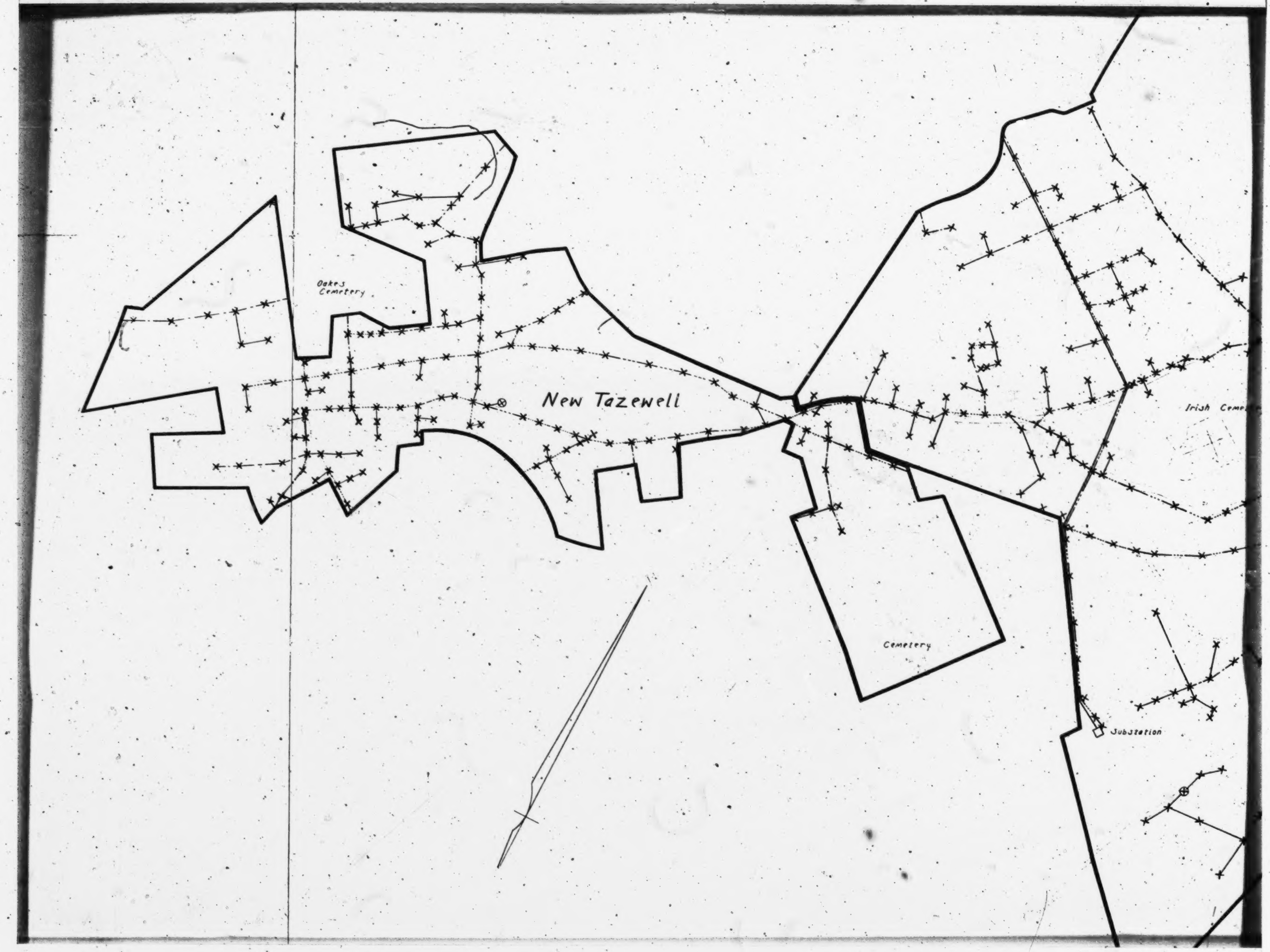
LASTER CEM

CLAIBORNE COUNTY HIGH SCH

IRISH CEM

SOLDIERS MEMORIAL SCHOOL

ROSENWALD SCHOOL


Oakes Cemetery
New Tazewell
Irish Ceme
Cemetery
Substation

TAZEWELL

IRISH CEM

EMORIAL

LASTER CEM

To

ROSENWALD SCHOOL

REVISED 12-30 BY JO
TO SHOW N E UNDERGROUND BETWEEN
P-1 TO P-4 1/0 CU IN
E OF N MCCLARY SUBDIVISION

SHEET NO. 1

KENTUCKY UTILITIES COMPANY

MAP OF OLD & NEW TAZEWELL

DIVISION OFFICE	PINEVILLE, KENTUCK
SCALE 1" = 400' approx.	DATE OF MAP 1-15-52
WORK ORDER NO.	DRAWN From Estimate Top
NOTE BOOK NO.	TRACED L. Jones
PAGE NO.	APPROVED
REVISED	DATE

In United States District Court
Exhibit No. 18

SOUTHERN

IN UNITED STATES DISTRICT COURT
EXHIBIT No. 18

OAKES CEM

BOUNDARY LINE

F.V.E. Co TERRITORY

NEW TAZEWELL

SOUTHERN

KNOXVILLE 42 MI.
MAYNARDVILLE 18 MI.

THOMPSONS CHAPEL CEM

THOMPSONS CHAPEL

BREWSTER CEM

F.V.E. Co TERRITORY

NEW TAZEWELL

HOGE CEM

BREWSTER CEM

SHEET NO. 2

KENTUCKY UTILITIES COMPANY

MAP OF OLD & NEW TAZEWELL

DIVISION OFFICE	PINEVILLE, KENTUCKY
SCALE 1" = 400' approx.	DATE OF MAP
WORK ORDER NO.	DRAWN
NOTE BOOK NO.	TRACED
PAGE NO.	APPROVED
REVISED	DATE

Brown Cemetery

Love Cemetery

Cemetery

Irish Cemetery

Laster Cemetery

Cemetery

Substation

Legend

K.U. Co. Lines

Telephone Co. Owned Joint Use Distribution Poles
(Five Such Poles Shown)

KENTUCKY UTILITIES CO.

Kentucky Utilities Company Facilities In The Corporate Boundaries Of Tazewell And New Tazewell, Tennessee As Of July 1, 1957.

DIVISION OFFICE	PINEVILLE, KENTUC
SCALE 1 Inch = 400 Feet	DATE OF MAP Sept. 11, 1
WORK ORDER NO.	DRAWN R.C. Hall
NOTE BOOK NO.	TRACED
PAGE NO.	APPROVED
REVISED	DATE DWG. NO.

EXHIBIT No. 25

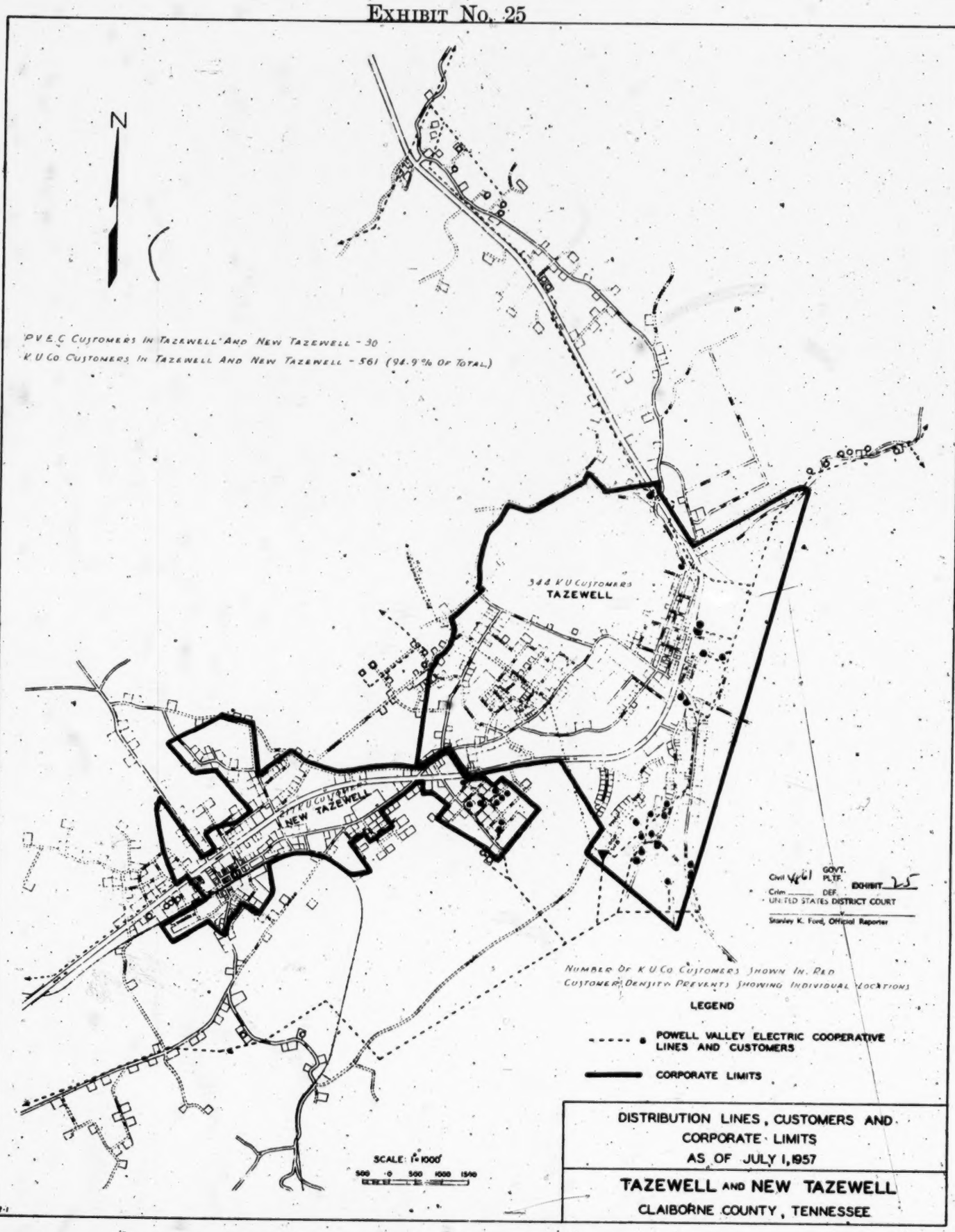
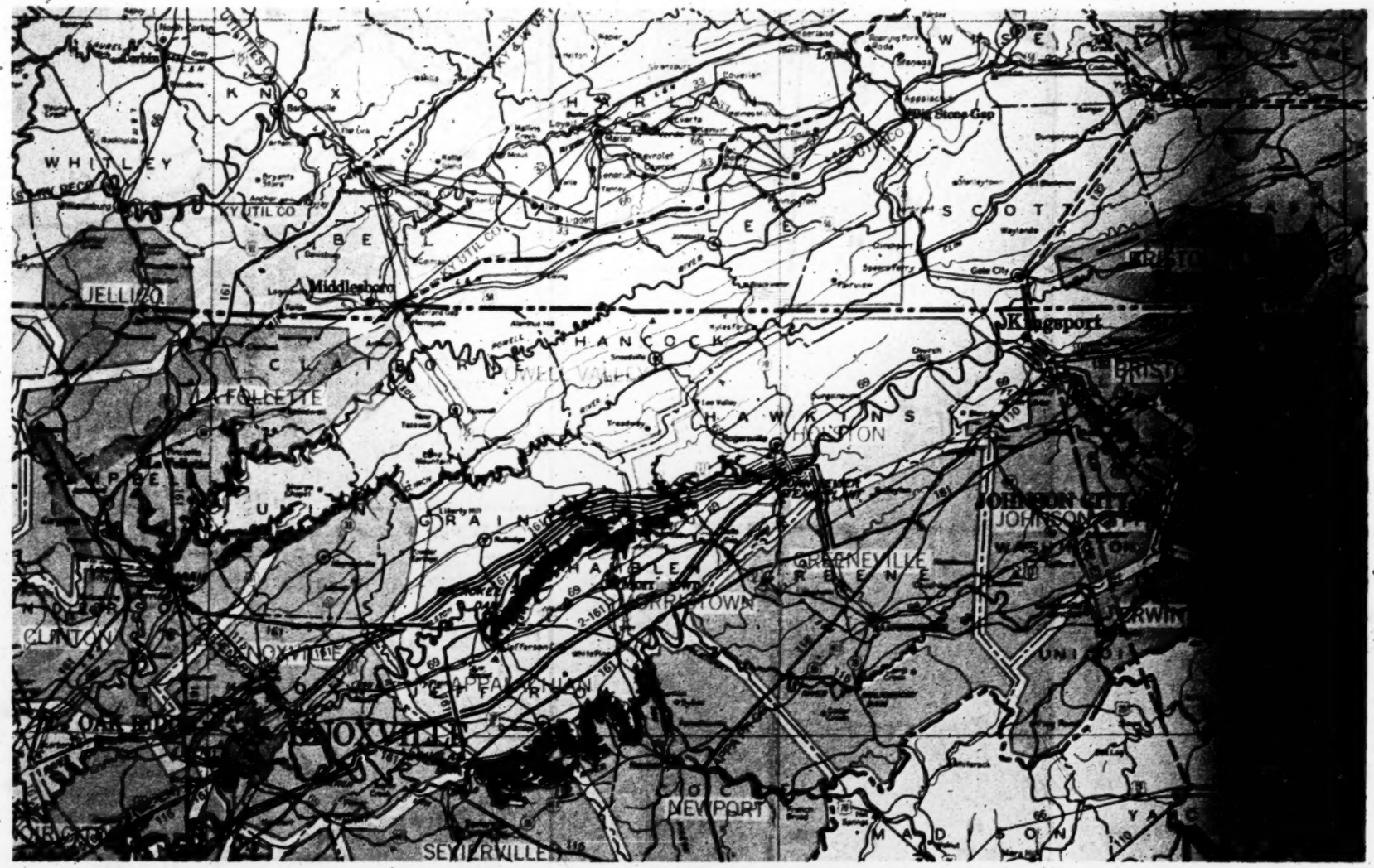


EXHIBIT No. 26



TENNESSEE VALLEY AUTHORITY
OFFICE OF POWER

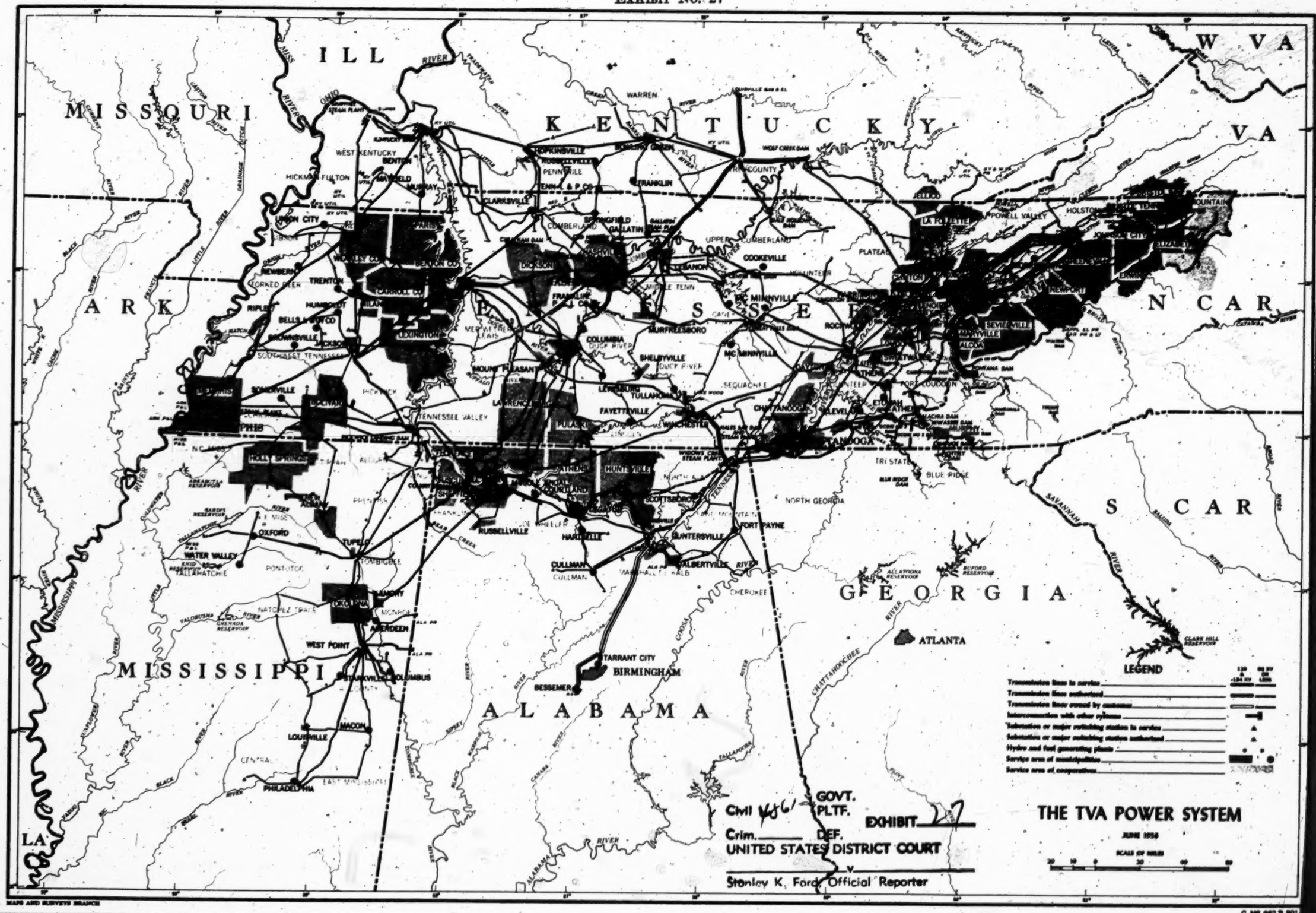
TRANSMISSION SYSTEM

LEGEND

- TRANSMISSION LINES IN SERVICE
- TRANSMISSION LINES UNDER CONSTRUCTION OR AUTHORIZED
- TRANSMISSION LINES IN SERVICE TO BE RETIRED
- INTERCONNECTION WITH OTHER SYSTEMS
- SUBSTATION OR MAJOR SWITCHING STATION IN SERVICE
- SUBSTATION OR MAJOR SWITCHING STATION UNDER CONSTRUCTION OR AUTHORIZED
- HYDRO GENERATING PLANTS
- FUEL GENERATING PLANTS
- PROPERTY OF TENNESSEE VALLEY AUTHORITY
- PROPERTY OF WHOLESALE CONTRACTORS
- PROPERTY OF PRIVATE UTILITIES
- SERVICE AREAS OF MUNICIPALITIES
- SERVICE AREAS OF COOPERATIVES

In United States District Court

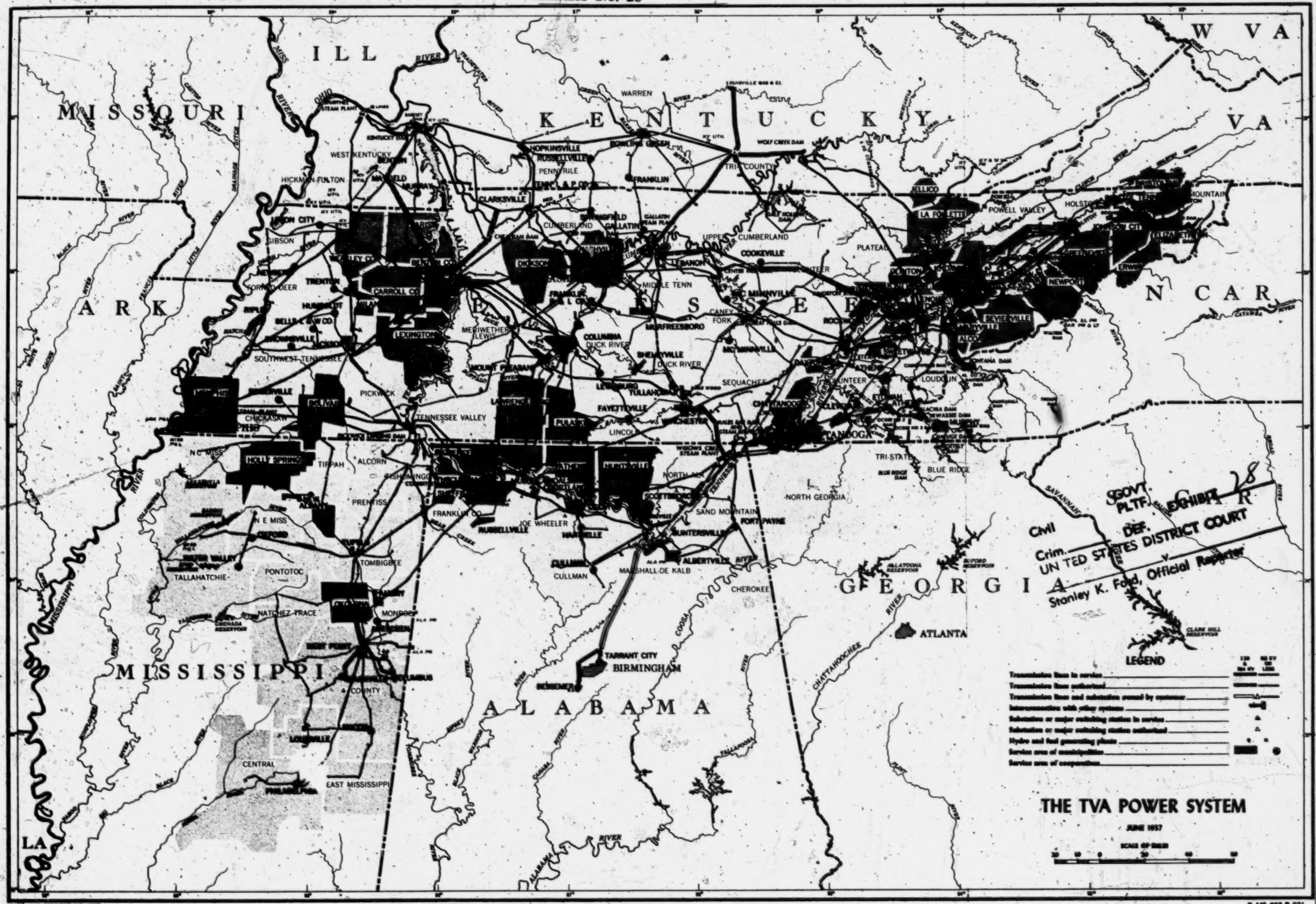
Exhibit No. 27



Civil 486 GOVT.
PLTF.
EXHIBIT 27
Crim. DEF.
UNITED STATES DISTRICT COURT
v.
Stanley K. Ford, Official Reporter

IN UNITED STATES DISTRICT COURT

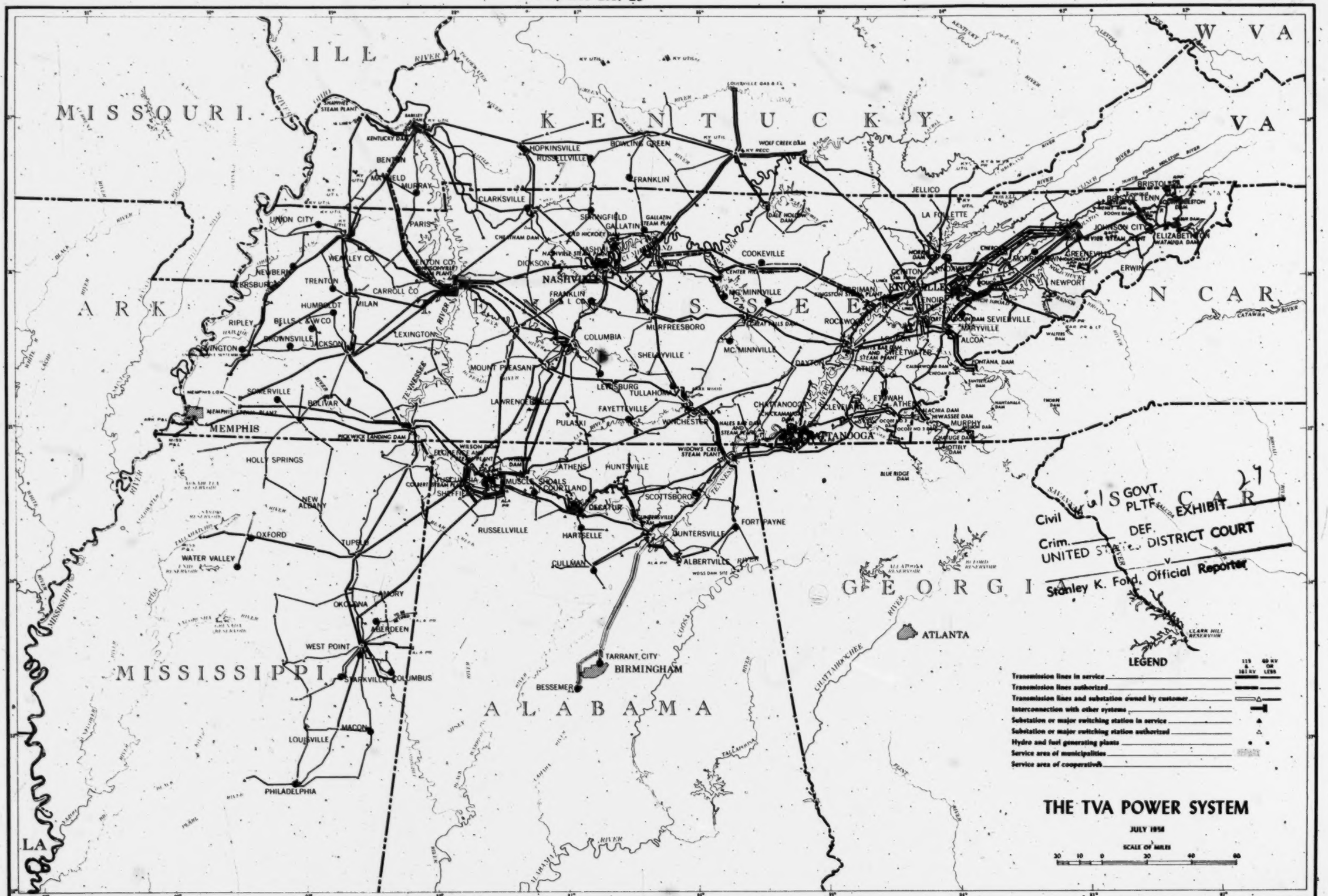
EXHIBIT No. 28



GOVT. PLTF. EXHIBIT 28
DEF.
Civil
Crim.
UNITED STATES DISTRICT COURT
Stanley K. Ford, Official Reporter

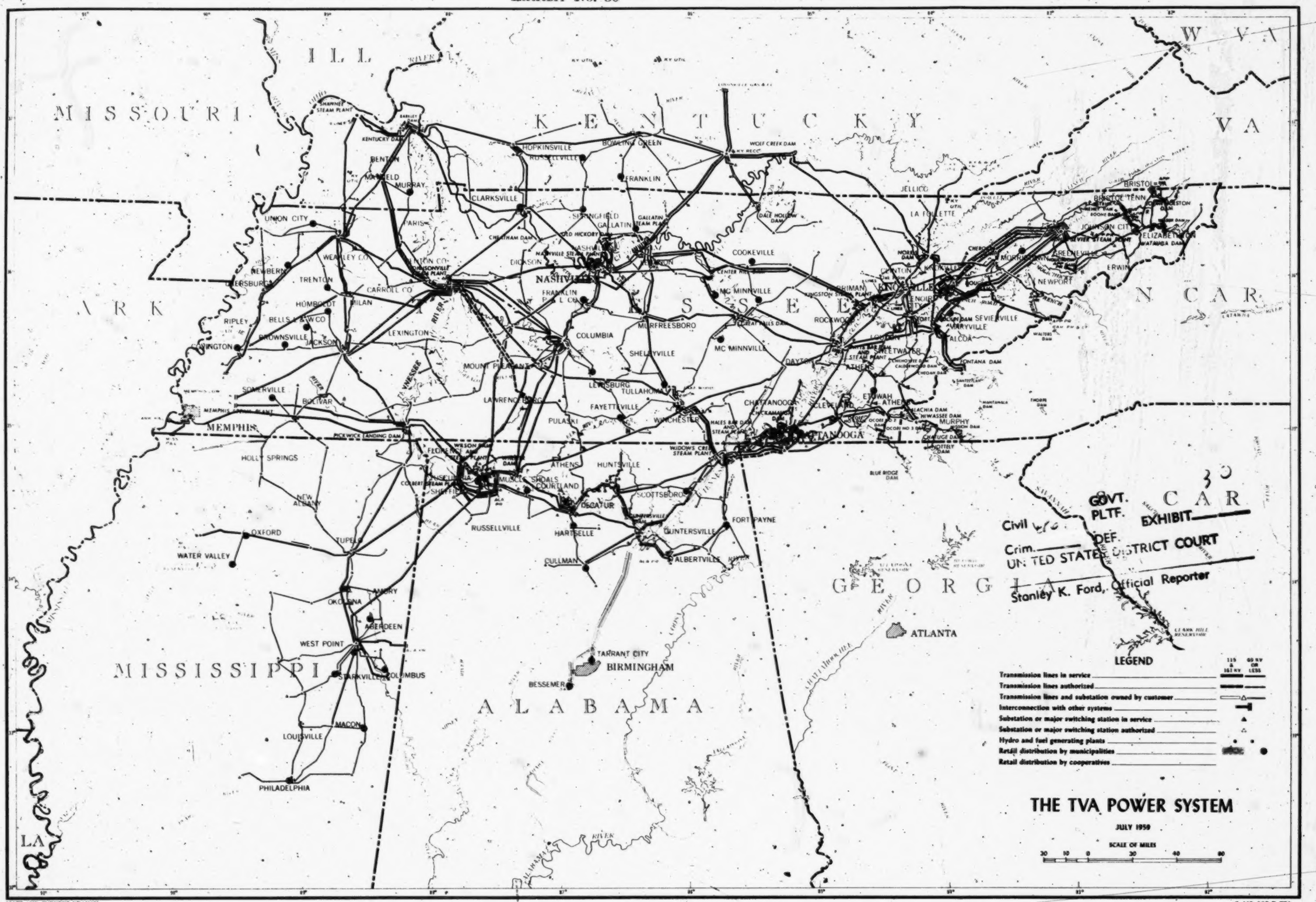
IN UNITED STATES DISTRICT COURT

EXHIBIT No. 29



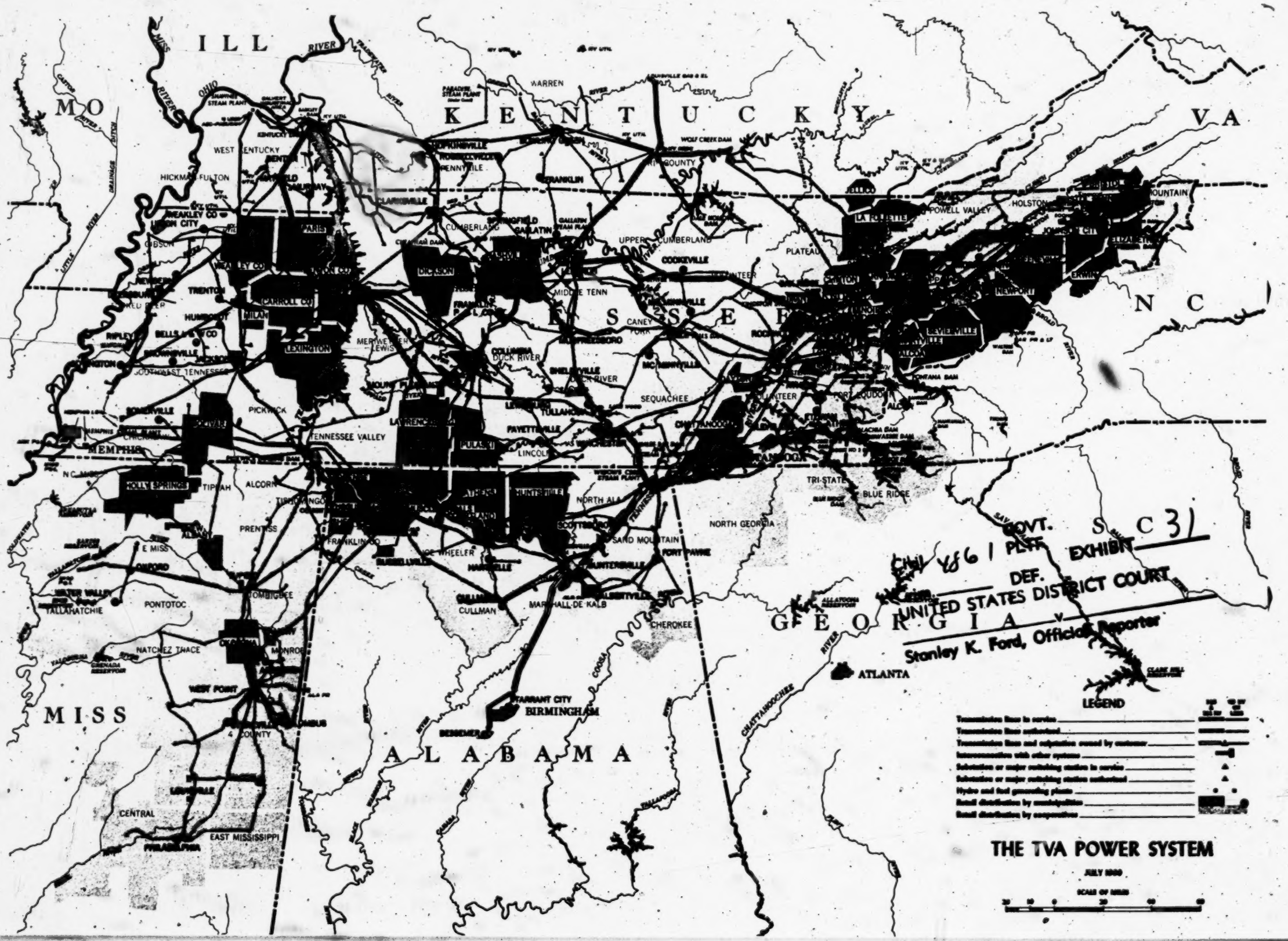
IN UNITED STATES DISTRICT COURT

EXHIBIT No. 30



IN UNITED STATES DISTRICT COURT

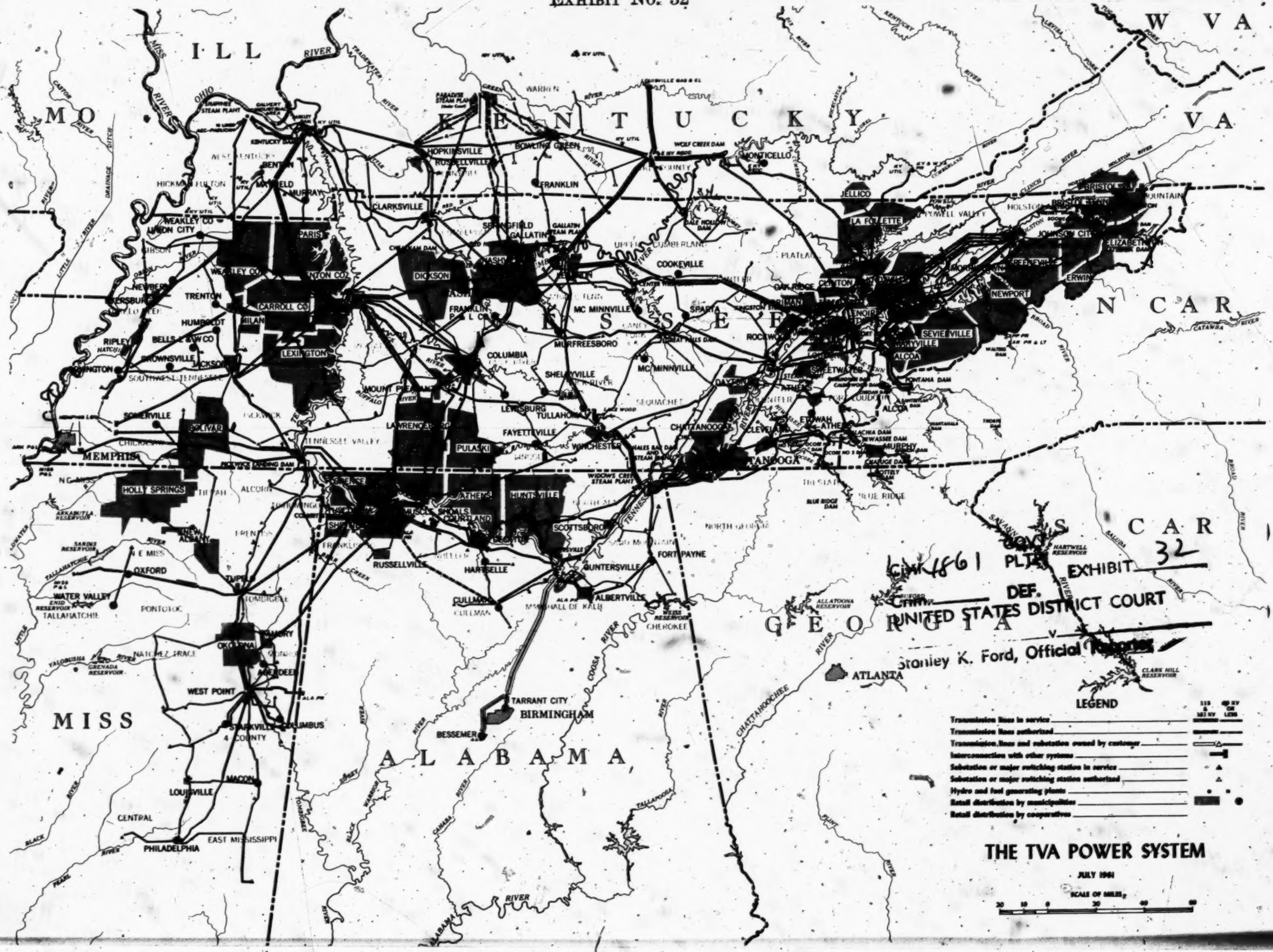
EXHIBIT No. 31



GOVT. EXHIBIT S C 31
Civil 4861 PLFF.
DEF.
UNITED STATES DISTRICT COURT
Stanley K. Ford, Official Reporter

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 32



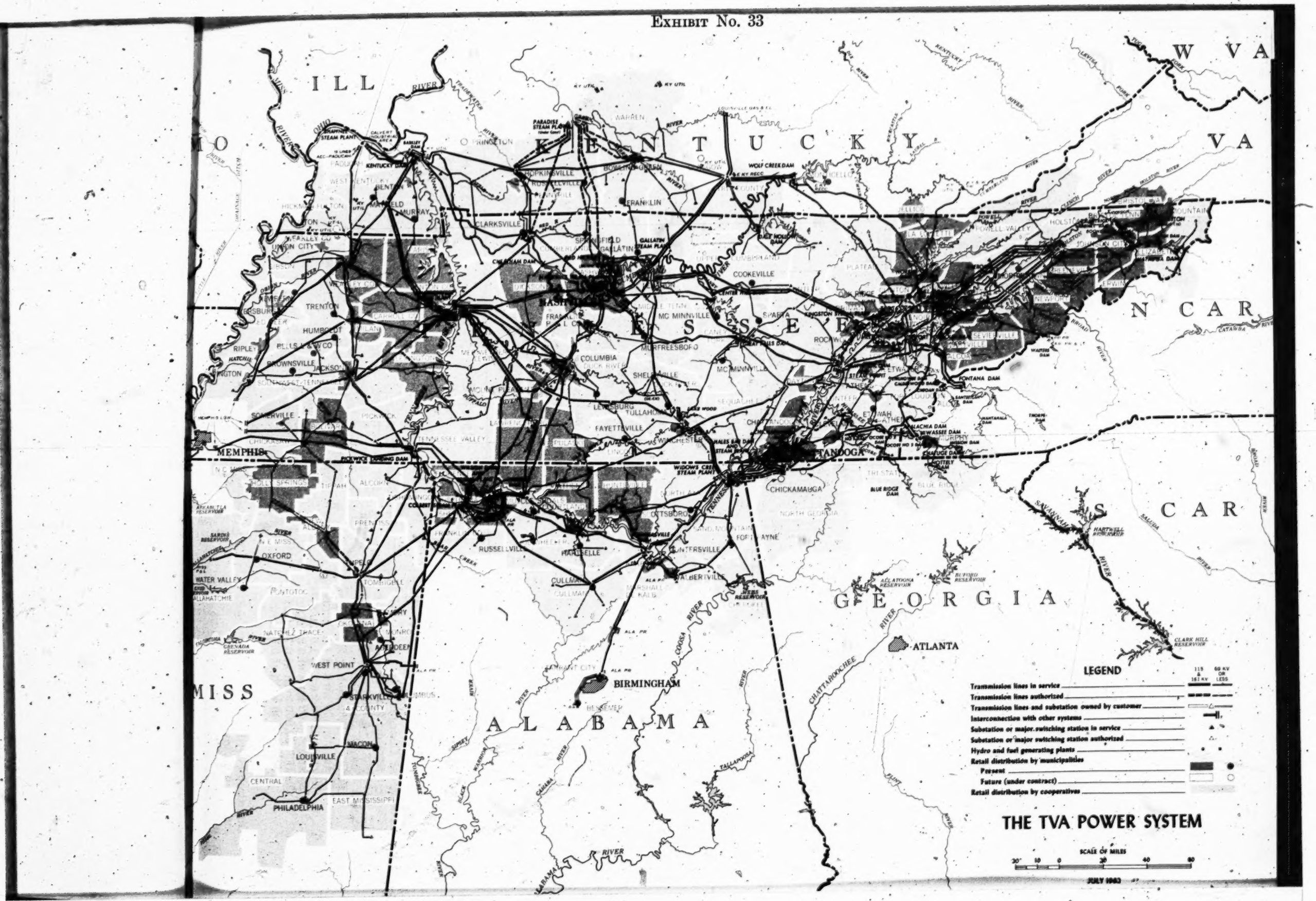
Civ 4861 PLF. EXHIBIT 32

DEF.

UNITED STATES DISTRICT COURT

Stanley K. Ford, Official Reporter

EXHIBIT No. 33



RETAIL RATES

(NORRIS CENTENNIAL RATES)

Second Intermediate Level	Lowest Level	
Rate R-1 Charge per kwh: First 100 kwh at 2.0 cents Next 250 kwh at 1.0 cent Next 700 kwh at 0.4 cent Additional kwh at 0.7 cent	**Rate R-2** Charge per kwh: First 100 kwh at 2.0 cents Next 150 kwh at 1.0 cent Next 650 kwh at 0.4 cent Additional kwh at 0.675 cent	**RESIDENTIAL SERVICE**
Rate G-1 **0-50 kw Demand** Demand Charge: First 10 kw, No Charge Addt'l kw at $0.80 per kw Energy Charge per kwh: First 200 kwh at 2.0 cents Next 300 kwh at 1.5 cents Next 1,000 kwh at 1.0 cent Next 8,500 kwh at 0.7 cent Additional kwh at 0.45 cent **50-5,000 kw Demand** Demand Charge: First 100 kw at $0.80 Addt'l kw at $1.00 Energy Charge per kwh: First 10,000 kwh at .70 cent Next 30,000 kwh at .45 cent Next 60,000 kwh at .40 cent Next 400,000 kwh at .30 cent Additional kwh at .275 cent Rate also includes a fuel clause. **Over 5,000 kw Demand** Demand Charge: $1.00 per kw Energy Charge: 0.275 cents per kw There is a rental charge for service at voltages below 44 kv; there is also a fuel clause.	**Rate G-2** **0-50 kw Demand** Demand Charge: First 10 kw, No Charge Addt'l kw at $0.75 per kw Energy Charge per kwh: First 200 kwh at 2.0 cents Next 300 kwh at 1.25 cents Next 1,500 kwh at 0.85 cent Next 8,000 kwh at 0.65 cent Additional kwh at 0.40 cent **50-5,000 kw Demand** Demand Charge: First 100 kw at $0.75 Addt'l kw at $1.00 Energy Charge per kwh: First 10,000 kwh at 0.65 cent Next 90,000 kwh at 0.40 cent Next 400,000 kwh at 0.30 cent Additional kwh at 0.275 cent Rate also includes a fuel clause. **Over 5,000 kw Demand** Demand Charge: $1.00 per kw Energy Charge: 0.275 cent per kwh There is a rental charge for service at voltages below 44 kv; there is also a fuel clause.	**LIGHTING AND POWER SERVICE**
Rate OL-1 **(Part A)** Street and park lighting, signal systems, and athletic field lighting installations. Investment Charge: 10% per annum; may be modified to not less than 8%. Energy Charge per kwh: First 200 kwh at 2.0 cents Next 300 kwh at 1.5 cents Next 1,000 kwh at 1.0 cent Next 8,500 kwh at 0.8 cent Next 90,000 kwh at 0.7 cent Additional kwh at 0.6 cent **(Part B)** Distributor will install outdoor lighting for individual customer at a flat monthly charge varying from $1.85 to $3.60, depending on fixture.	**Rate OL-1** **(Part A)** Street and park lighting, signal systems, and athletic field lighting installations. Investment Charge: 10% per annum; may be modified to not less than 8%. Energy Charge per kwh: First 200 kwh at 2.0 cents Next 300 kwh at 1.5 cents Next 1,000 kwh at 1.0 cent Next 8,500 kwh at 0.8 cent Next 90,000 kwh at 0.7 cent Additional kwh at 0.6 cent **(Part B)** Distributor will install outdoor lighting for individual customer at a flat monthly charge varying from $1.85 to $3.60, depending on fixture.	**OUTDOOR LIGHTING SERVICE**

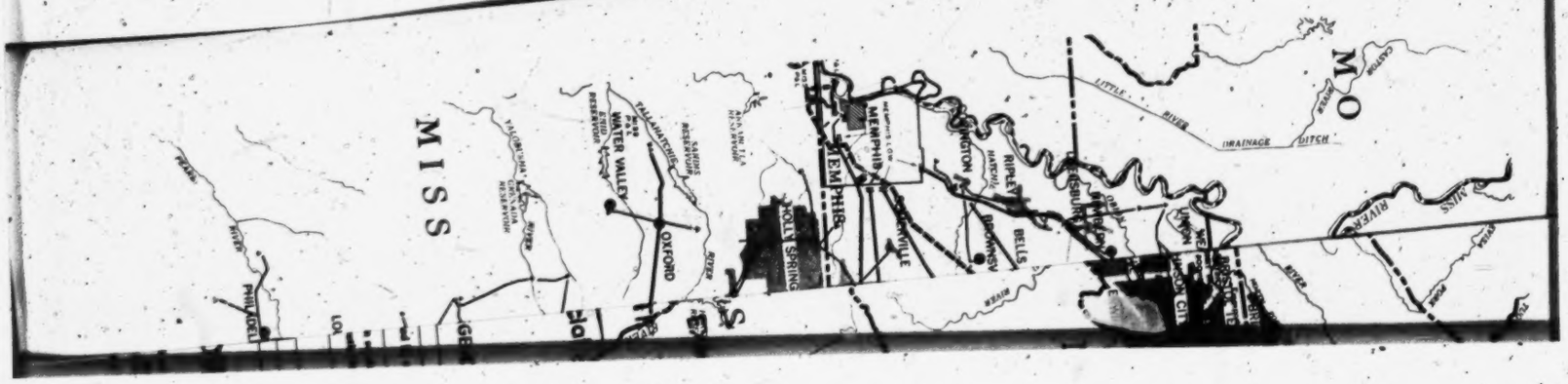
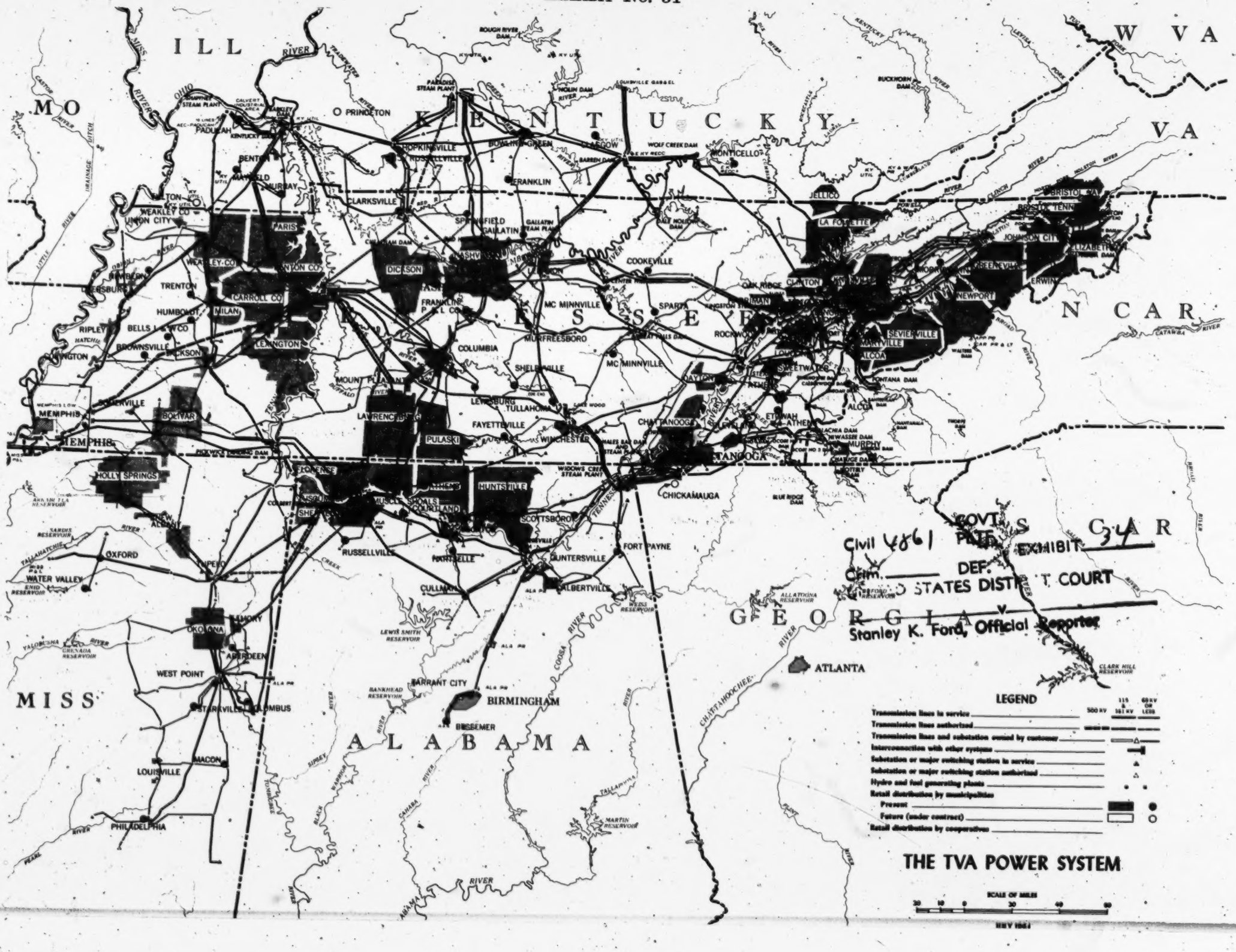


EXHIBIT No. 34



Civil 4861 PLTF. EXHIBIT 34
Chm. DEF.
STATES DIST T. COURT
Stanley K. Ford, Official Reporter

71

monthly charge varying from $1.85 to $3.60, depending on fixture.

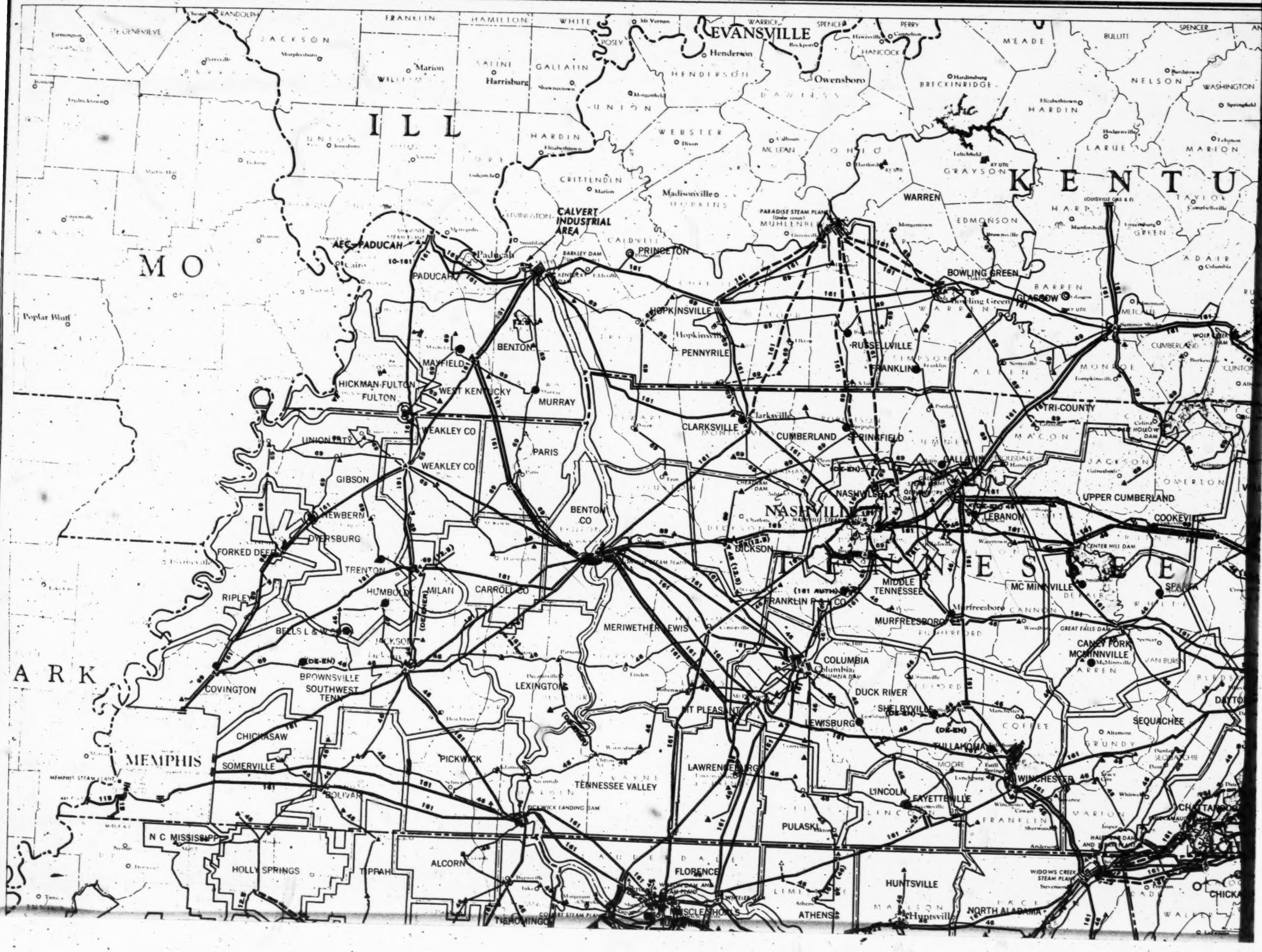
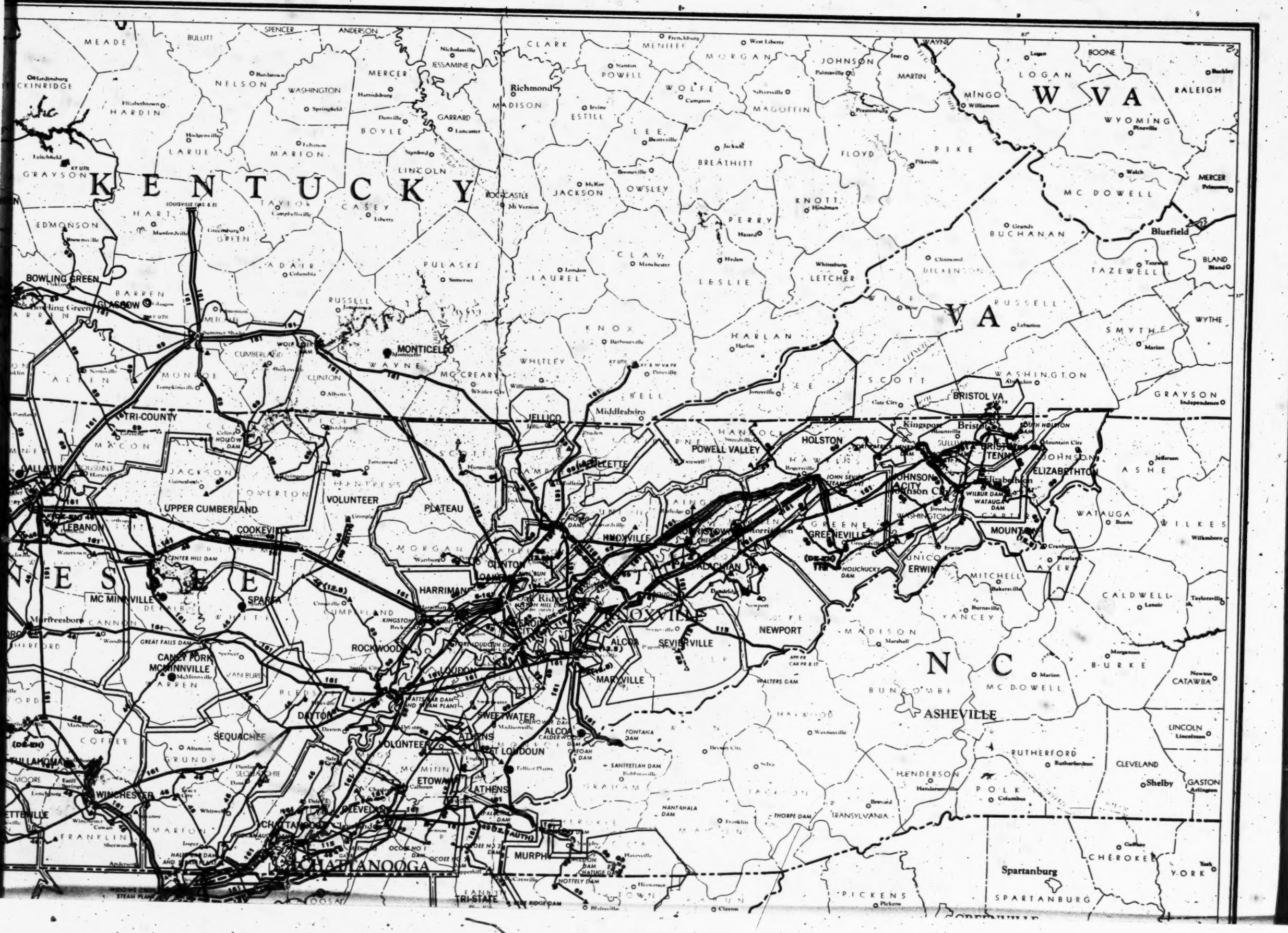
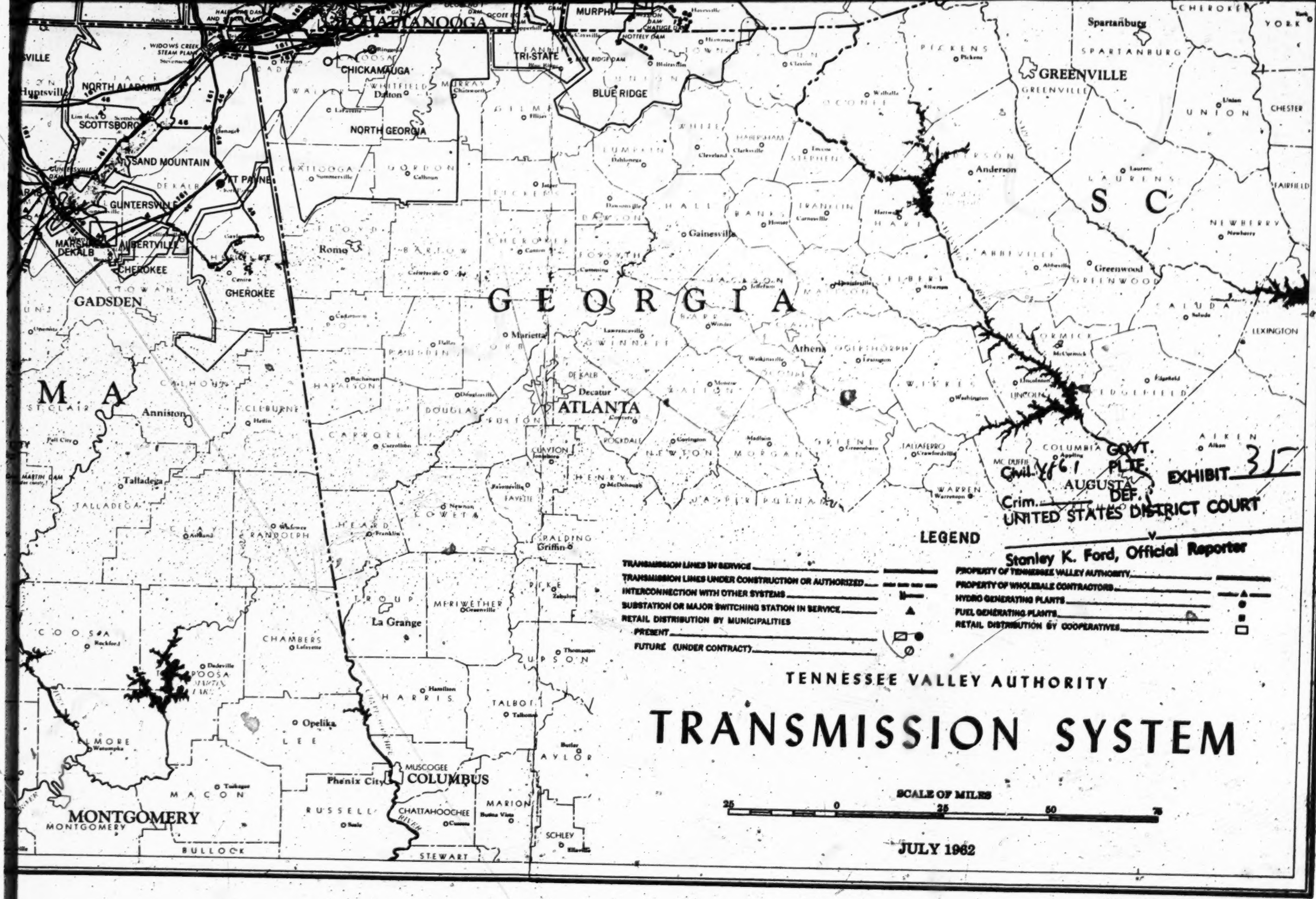

EVANSVILLE
Henderson
Owensboro
Madisonville
Hopkinsville
Princeton
Paducah
Cairo
Poplar Bluff
Marion
Harrisburg
Morganfield
Elizabethtown
Leitchfield
Bowling Green
Glasgow
Russellville
Franklin
Clarksville
Springfield
Gallatin
Lebanon
Nashville
Murfreesboro
McMinnville
Columbia
Lewisburg
Fayetteville
Pulaski
Huntsville
Athens
Florence
Tishomingo
Corinth
Holly Springs
Memphis
Somerville
Brownsville
Covington
Ripley
Dyersburg
Newbern
Trenton
Humboldt
Milan
Jackson
Paris
Benton
Murray
Mayfield
Hickman
Fulton
Union City
Weakley Co
Gibson
Forked Deer
Bells
Lexington
Pickwick
Tennessee Valley
Bolivar
Chickasaw
Southwest Tenn
N C Mississippi
Alcorn
Tippah
Benton Co
Carroll Co
Meriwether Lewis
Dickson
Middle Tennessee
Franklin P & L Co
Duck River
Mt Pleasant
Lawrenceburg
Tri-County
Upper Cumberland
Cookeville
Sequachee
Winchester
Lincoln
Widows Creek
North Alabama
Chickamauga
Center Hill Dam
Great Falls Dam
Cheatham Dam
Pickwick Landing Dam
Kentucky Dam
Barkley Dam
Paradise Steam Plant
Calvert Industrial Area
AEC-Paducah
West Kentucky
Louisville Gas & El
Kentucky
Tennessee
Illinois
Missouri
Arkansas
Mississippi
Ohio
Webster
Union
Hardin
Crittenden
Caldwell
Princeton
Todd
Logan
Simpson
Allen
Monroe
Barren
Metcalfe
Green
Taylor
Adair
Warren
Edmonson
Grayson
Breckinridge
Meade
Bullitt
Nelson
Washington
Larue
Marion
Spencer
Perry
Hancock
Daviess
McLean
Ohio
Muhlenberg
Hopkins
Union
Jackson
Williamson
Saline
Gallatin
Posey
White
Franklin
Hamilton
Randolph
Ste Genevieve
Perry
Jackson
Union
Alexander
Pulaski
Massac
Pope
Hardin
Johnson
Union
Williamson
Franklin
Jackson
Perry
Wayne
Hickman
Lake
Obion
Dyer
Lauderdale
Tipton
Haywood
Fayette
Shelby
Crockett
Madison
Henderson
Chester
Carroll
Benton
Decatur
Henry
Stewart
Montgomery
Robertson
Sumner
Wilson
Trousdale
Smith
Macon
Clay
Overton
Putnam
White
Cannon
Rutherford
Williamson
Maury
Lewis
Hickman
Dickson
Cheatham
Davidson
Wilson
Sumner
Trousdale
Jackson
Clay
Fentress
Pickett
Overton
Putnam
White
Van Buren
Warren
Coffee
Grundy
Marion
Hamilton
Bradley
Polk
Meigs
Rhea
Sequatchie
Franklin
Lincoln
Moore
Bedford
Marshall
Giles
Lawrence
Wayne
Hardin
Perry
Lee
Chickasaw
Pontotoc
Union
Tippah
Alcorn
Prentiss
Tishomingo
Itawamba
Lee
Monroe
Clay
Oktibbeha
Lowndes
Noxubee
Kemper
Neshoba
Winston
Choctaw
Webster
Calhoun
Yalobusha
Grenada
Montgomery
Carroll
Leflore
Sunflower
Tallahatchie
Quitman
Panola
Tate
Desoto
Marshall
Tunica
Coahoma
Bolivar
Washington
Humphreys
Yazoo
Madison
Holmes
Attala
Leake
Scott
Newton
Jasper
Clarke
Lauderdale
Kemper
Neshoba
Winston
Choctaw
Webster
Calhoun
Yalobusha
Grenada
Montgomery
Carroll
Leflore
Sunflower
Tallahatchie
Quitman
Panola
Tate
Desoto
Marshall
Tunica
Coahoma
Bolivar
Washington
Humphreys
Yazoo
Madison
Holmes
Attala
Leake
Scott
Newton
Jasper
Clarke
Lauderdale

EXHIBIT No. 35


KENTUCKY
TENNESSEE
W VA
VA
N C
MEADE
BULLITT
SPENCER
ANDERSON
NELSON
WASHINGTON
MERCER
JESSAMINE
CLARK
MADISON
Richmond
MENIFEE
MORGAN
POWELL
WOLFE
MAGOFFIN
JOHNSON
MARTIN
WAYNE
MINGO
LOGAN
BOONE
RALEIGH
WYOMING
HARDIN
LARUE
MARION
BOYLE
GARRARD
ESTILL
LEE
BREATHITT
FLOYD
PIKE
GRAYSON
LINCOLN
TAYLOR
CASEY
ROCKCASTLE
JACKSON
OWSLEY
KNOTT
MC DOWELL
MERCER
Bluefield
EDMONSON
HART
GREEN
ADAIR
PULASKI
LAUREL
CLAY
PERRY
LESLIE
LETCHER
BUCHANAN
TAZEWELL
BLAND
BOWLING GREEN
BARREN
GLASGOW
RUSSELL
KNOX
HARLAN
WYTHE
SMYTH
ALLEN
MONROE
CUMBERLAND
CLINTON
WAYNE
MC CREARY
WHITLEY
BELL
SCOTT
WASHINGTON
GRAYSON
MONTICELLO
TRI-COUNTY
JELLICO
Middlesboro
BRISTOL VA
POWELL VALLEY
HOLSTON
ELIZABETHTON
ASHE
WATAUGA
WILKES
UPPER CUMBERLAND
VOLUNTEER
PLATEAU
LEBANON
COOKEVILLE
CENTER HILL DAM
KNOXVILLE
HARRIMAN
CLINTON
MORGAN
MC MINNVILLE
SPARTA
Murfreesboro
CANNON
GREAT FALLS DAM
CAGLE FORK
MCMINNVILLE
ROCKWOOD
DAYTON
SWEETWATER
ATHENS
LOUDOUN
ALCOA
MARYVILLE
SEVIERVILLE
NEWPORT
SEQUACHEE
GRUNDY
COFFEE
VOLUNTEER
ETOWAH
CLEVELAND
WINCHESTER
FRANKLIN
CHATTANOOGA
MURPHY
TRI-STATE
FONTANA DAM
SANTEETLAH DAM
NANTAHALA DAM
THORPE DAM
WALTERS DAM
ASHEVILLE
MADISON
YANCEY
MITCHELL
CALDWELL
BURKE
CATAWBA
LINCOLN
RUTHERFORD
POLK
HENDERSON
CLEVELAND
Shelby
GASTON
TRANSYLVANIA
PICKENS
CHEROKEE
Spartanburg
SPARTANBURG
YORK
GREENEVILLE
ERWIN
JOHNSON CITY
Kingsport
Bristol
UNICOI
GREENE
Gate City
Pikeville
Hazard
Harlan
Whitesburg
Jonesville
Pineville
Williamson
Logan
Paintsville
Prestonsburg
Salyersville
Campton
Irvine
Stanton
Beattyville
Jackson
Booneville
McKee
Mt Vernon
London
Manchester
Hyden
Barbourville
Williamsburg
Hindman
Whitley City
Somerset
Columbia
Liberty
Campbellsville
Lebanon
Springfield
Harrodsburg
Danville
Lancaster
Nicholasville
Frenchburg
West Liberty
Elizabethtown
Hodgenville
Leitchfield
Brownsville
Munfordville
Greensburg
Glasgow
Bowling Green
Albany
Jamestown
Livingston
Monticello
Somerset
Whitley City
Williamsburg
Jonesville
Pineville
Middlesboro
Harlan
Barbourville
Corbin
London
Manchester
Hyden
Hazard
Whitesburg
Hindman
Prestonsburg
Paintsville
Salyersville
Campton
Irvine
Stanton
Beattyville
Jackson
Booneville
McKee
Mt Vernon
Richmond
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Frenchburg
West Liberty
Logan
Williamson
Pineville
Princeton
Welch
Grundy
Clintwood
Tazewell
Lebanon
Marion
Abingdon
Gate City
Kingsport
Bristol
Elizabethton
Johnson City
Jonesborough
Erwin
Greeneville
Morristown
Newport
Sevierville
Maryville
Alcoa
Athens
Sweetwater
Madisonville
Dayton
Rockwood
Oak Ridge
Harriman
Clinton
Jamestown
Crossville
Cookeville
Lebanon
Sparta
McMinnville
Manchester
Tullahoma
Winchester
Cleveland
Chattanooga
Murphy
Hayesville
Clayton
Waynesville
Brevard
Hendersonville
Rutherfordton
Shelby
Gaffney
Spartanburg
Pickens
Greenville
Asheville
Marion
Morganton
Newton
Lincolnton
Taylorsville
Lenoir
Burnsville
Marshall
Wilkesboro
Boone
Jefferson
Mountain City
Elizabethton
Johnson City
Kingsport
Bristol
Abingdon
Lebanon
Grundy
Princeton
Welch
Pineville
Williamson
Logan
Buckhannon



Maps and Surveys Branch



Civil No. 61 GOVT. PLTF. EXHIBIT 37

Crim. DEF.

UNITED STATES DISTRICT COURT

Stanley K. Ford, Official Reporter

LEGEND

- TRANSMISSION LINES IN SERVICE
- TRANSMISSION LINES UNDER CONSTRUCTION OR AUTHORIZED
- INTERCONNECTION WITH OTHER SYSTEMS
- SUBSTATION OR MAJOR SWITCHING STATION IN SERVICE
- RETAIL DISTRIBUTION BY MUNICIPALITIES
  - PRESENT
  - FUTURE (UNDER CONTRACT)
- PROPERTY OF TENNESSEE VALLEY AUTHORITY
- PROPERTY OF WHOLESALE CONTRACTORS
- HYDRO GENERATING PLANTS
- FUEL GENERATING PLANTS
- RETAIL DISTRIBUTION BY COOPERATIVES

TENNESSEE VALLEY AUTHORITY

TRANSMISSION SYSTEM

SCALE OF MILES

25 0 25 50 75

JULY 1962

WHEN ORDERING SPECIFY MAP 82

[fol. 1209] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 36

TENNESSEE VALLEY AUTHORITY
Chattanooga, Tennessee

June 18, 1952.

Mr. N. P. Taylor, Chief Power Engineer
Kentucky Utilities Company, Inc.
159 West Main Street
Lexington 3, Kentucky

Dear Mr. Taylor:

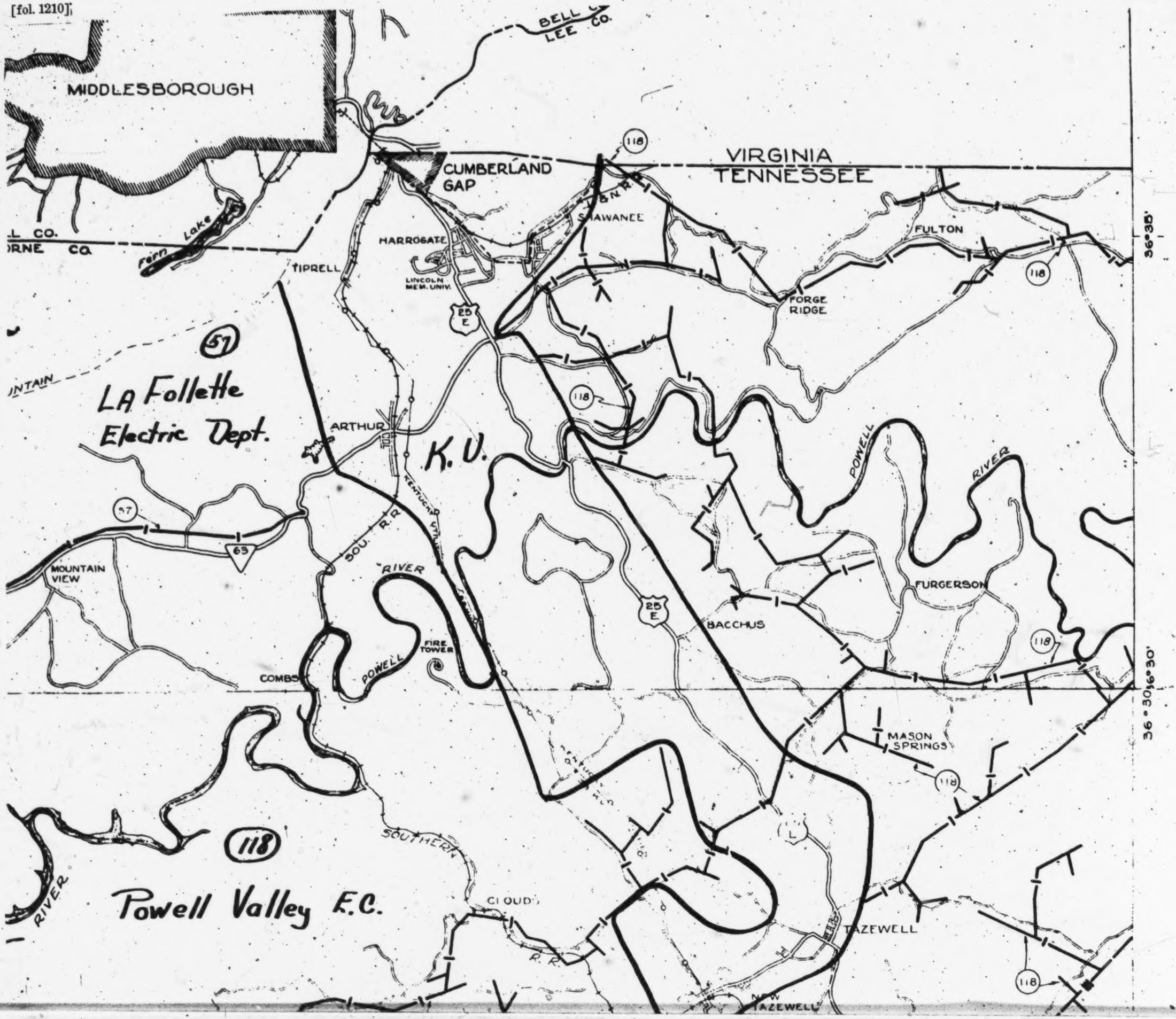
I am attaching map made up of our LC-7000 series of distribution maps showing the areas now served by the LaFollette Electric Department, the Powell Valley Electric Cooperative, and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee.

These maps are easy for us to reproduce if it becomes necessary to have copies made.

Very truly yours, Tennessee Valley Authority, Merrill DeMerit, Chief Power Engineer

Attachment

[fol. 1210]


MIDDLESBOROUGH
BELL CO.
LEE CO.
VIRGINIA
TENNESSEE
CUMBERLAND GAP
118
L CO.
RNE CO
Fern Lake
HARROGATE
L & N R.R.
SHAWANEE
FULTON
TIPRELL
LINCOLN MEM. UNIV.
25 E
FORGE RIDGE
36°35'
57
LA Follette Electric Dept.
ARTHUR
K.U.
POWELL
RIVER
97
65
MOUNTAIN VIEW
SOU. R.R.
KENTUCKY
RIVER
FURGERSON
BACCHUS
FIRE TOWER
COMBS
POWELL
36°30'
MASON SPRINGS
118
SOUTHERN
RIVER
Powell Valley E.C.
CLOUD'S
R.R.
TAZEWELL
NEW TAZEWELL

Powell Valley E.C.

RIVER

CLOUDS

R R

TAZEWELL

118

NEW TAZEWELL

GOIN

FORD CHAPEL

33

25 E

SPRINGDALE

36-25'

SANDLICK

LONE MOUNTAIN

LITTLE BARREN

118

DUTCH

RIVER

CLINCH

SOUTHERN R R

36-20'

ACUFF

UNION GRAINGER CO

LIBERTY HILL

PUNCHEON CAMP

WASHBURN

NAVE HILL

NOE CHAPEL

36

RUTLEDGE

10 % Permanent Buck
2-10 KVA
13,800-120/240 V

36-015

36-023

LITTLE BARREN

ACUFF

UNION GRAINGER CO

NAVE HILL

4 ACSR

118

CLINCH RIVER

DUTCH

SOUTHERN RR

LIBERTY HILL

4 ACSR

WASHBURN

PUNCHEON CAMP

NOE CHAPEL

10 % Permanent Buck
2-10 KVA
13,800-120/240 V.

36

RUTLEDGE

36-015

36-023

3 PHD

11 W

92

4 ACSR

81

4 ACSR

4 ACSR

POWDER SPRINGS

36°20'

36°15'

83°45'

83°40'

83°35'

83°30'

SCALE OF MILES

0 1 2 3 4

COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA

(36) APPALACHIAN ELECTRIC COOPERATIVE

(81) KNOXVILLE ELECTRIC POWER AND WATER BOARD

(57) LA FOLLETTE ELECTRIC DEPT.

(118) POWELL VALLEY ELECTRIC COOPERATIVE

1	General Revision	6/6/45	JJH

TENNESSEE VALLEY AUTHORITY

DEPARTMENT OF OPERATIONS

TRANSMISSION AND RURAL DISTRIBUTION LIN
IN CAMPBELL, CLAIBORNE, UNION AND GRAIN
COUNTIES, TENNESSEE

DATE: 11-30-44

DRAWN: Z.K.S.

TRACED: Z.K.S.

CHECKED:

SUBMITTED: J. T. Thompson

APPROVED: H. O. Weber

36-8

L-C

KENTUCKY

WHITLEY CO.

BELL CO.

CAMPBELL COUNTY

UNION COUNTY

CUMBERLAND MOUNTAIN

To K.U. Park

T.V.A. 161 KV

Fogon

Clairfield

T.V.A. 161 KV

Valley Creek

2/0 ACSR 33 KV

To Middlesboro

T.V.A.

Yellow Cr. Sub 2.4, 4.1

2/0 ACSR 33 KV

Pork Ridge

Bryson Mt. Sub 2.4, 4.1

Bryson

To Middlesboro

2/0 ACSR 33 KV

Cumberland Gap

To Cumb. Gap Sub 7.2-12.47 (2.4)

L. M. U.

L. M. U. Sub (2.4)

Tiprell

Jean Lake

Patterson Crossroad

Arthur

Underwood School

Clouds

Myers

Sandlick

Corr Branch

Collins Mill

Pleasant Point

Pleasant Hill

Cawood

69

Speedwell

Russell Mill

To Lafollette

VIRGINIA

LEE COUNTY

HANCOCK COUNTY

Cumberland Gap

Tiprell

Stanley Lake

Patterson Crossroad

Arthur

Underwood School

Vortex Mill

Bacchus

Malcom

Baldwin Mill

Clouds

Old Tazewell

Collins Mill

Pleasant Point

Myers

Sandlick

Corr Branch

Lone Mt.

Showanee

Greers Chapel

Forge Ridge

Little Creek

Oak Grove

Big Spring

Hopewell

Hoop

Old Cedar Fork

Howard Quarter

Pleasant View

Springdale

To Sneedville

To Morristown

POWELL RIVER

CLINCH RIVER

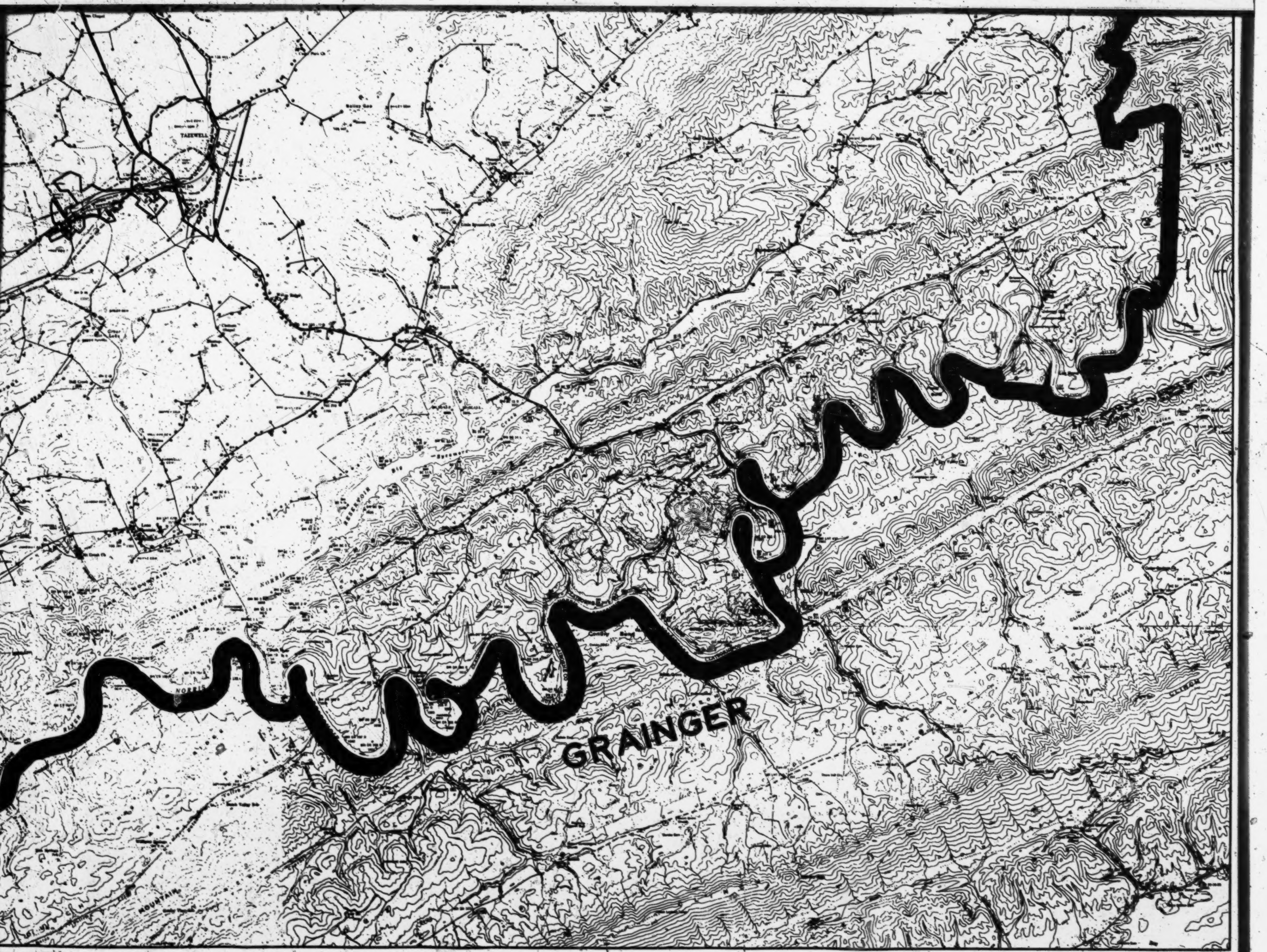
New 33

Old 33

33 KV

R.E.A.

D.V.E.C.-Tazewell R.E.A. Sub 12.16 - 7.2


TAZEWELL
GRAINGER

[fol. 1212]

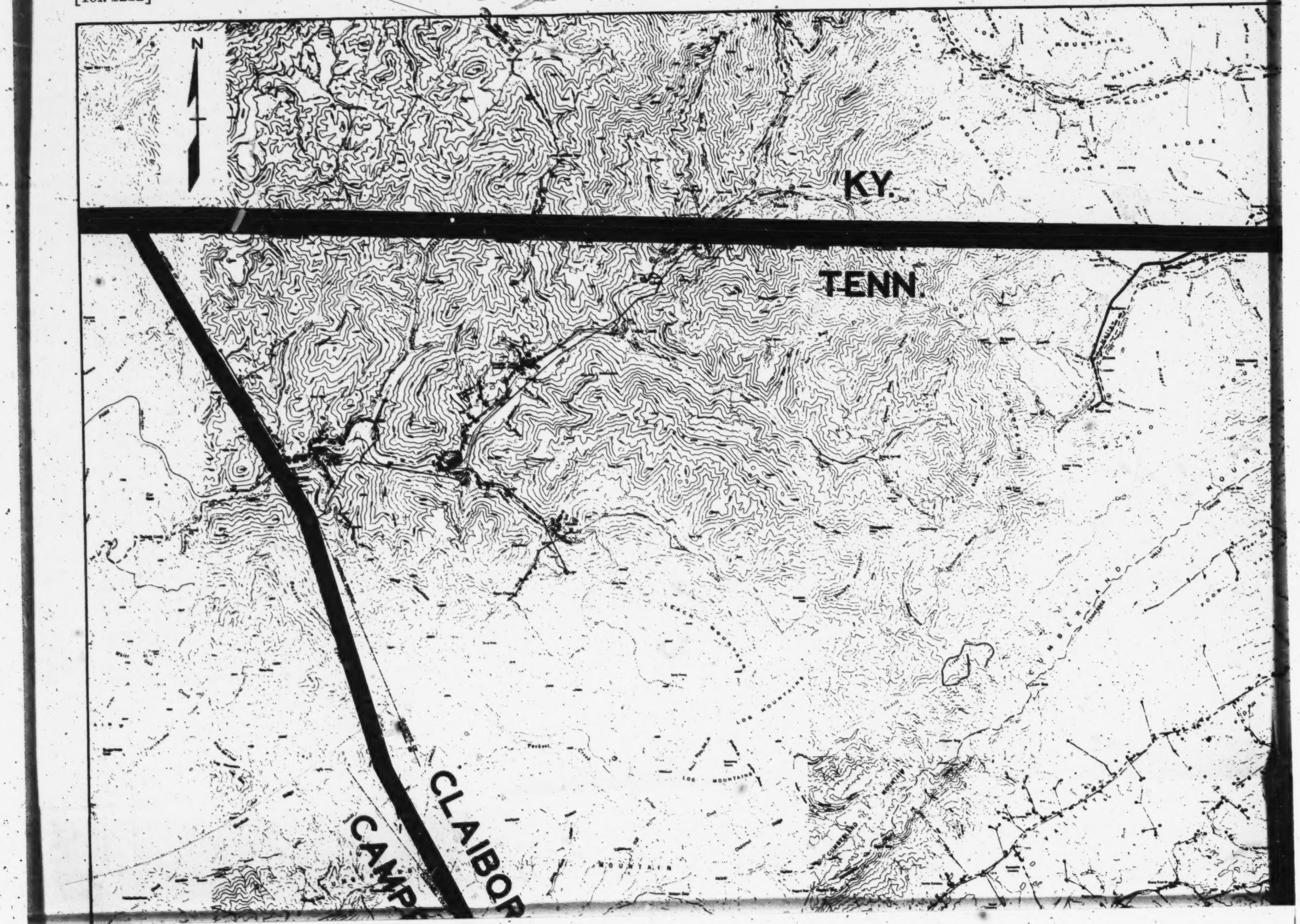
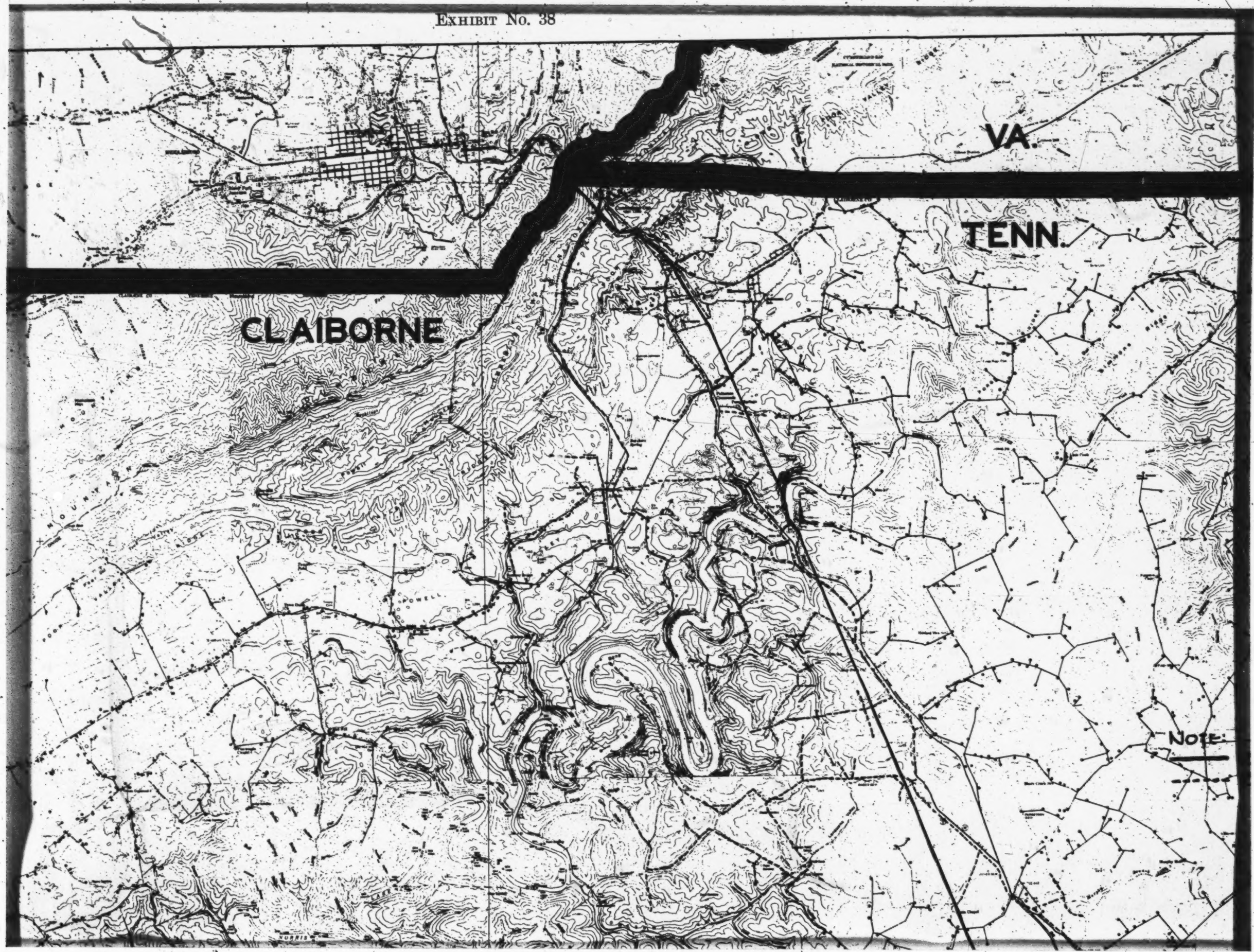


EXHIBIT No. 38



VA.

TENN.

HANCOCK

CLAIBORNE

POWELL

WALLEN RIDGE

NOTE:

K.U. 345 K.V. TRANSMISSION LINES

K.U. 125 K.V. DISTRIBUTION LINES

BELL

RNE

UNION

CUSTOMERS AND LINES OF
TVA POWER DISTRIBUTORS
AS OF JULY 1, 1957, IN

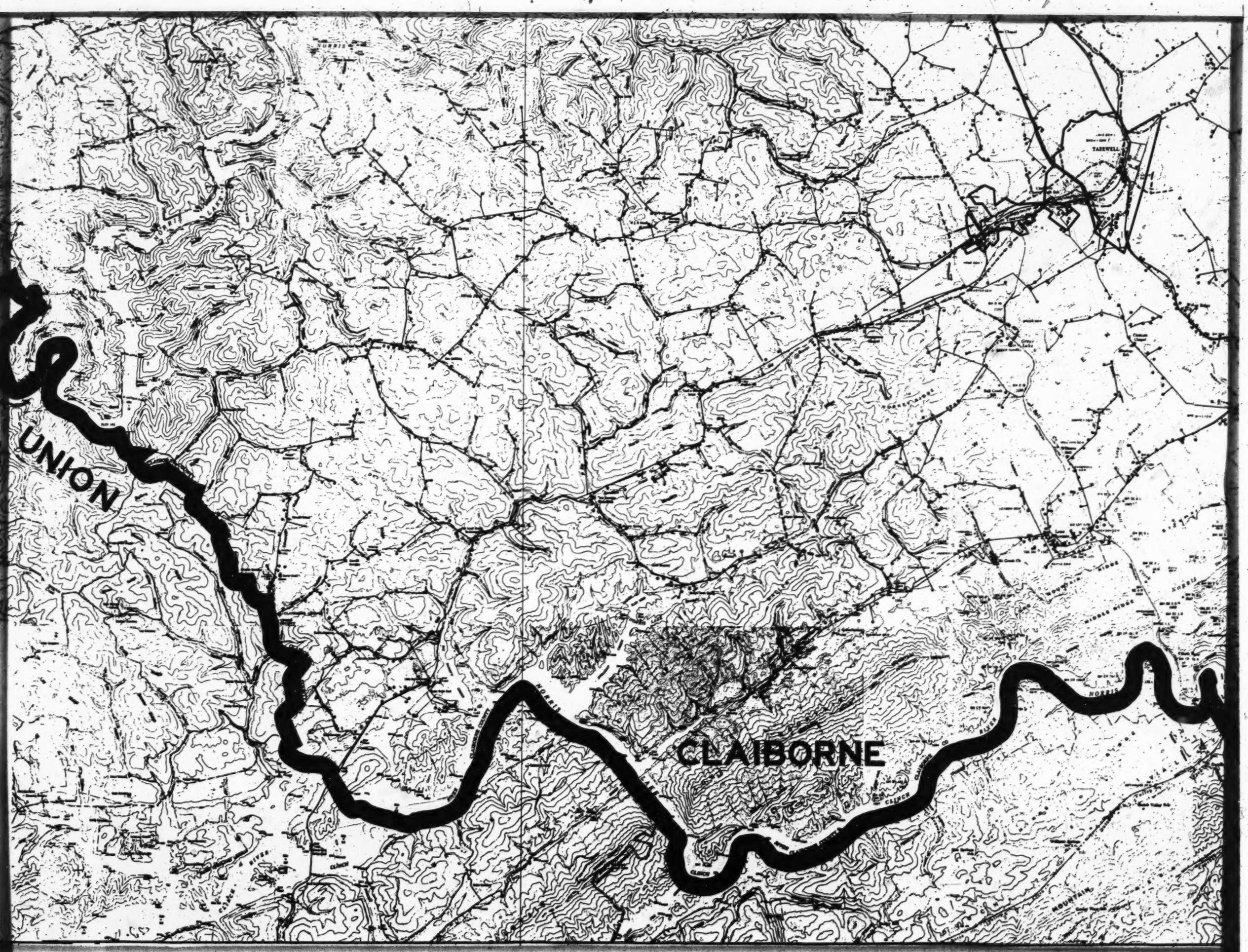
CLAIBORNE COUNTY, TENNESSEE

CUSTOMER ● LINES

SCALE 1"=3000'

0 1 2 3 4 MILES

5,000 0 5,000 10,000 15,000 20,000 FEET


UNION
CLAIBORNE
TAZEWELL
NORRIS
LAKE
CLINCH
RIVER
MOUNTAIN

[fol. 1213] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 39

Towns Presently Supplied by Investor Owned Electric Utilities Which Towns Are Completely Surrounded by TVA's Power Service Area as Such Area Is Shown on TVA's July, 1958 Transmission System Map, Exhibit ——.

Town and State	Supplied By	Wholesale or Retail	Population
Calhoun, Ga.	Georgia Power Co.	Wholesale	3,587
Chickamauga, Ga.	Georgia Power Co. (1)	Retail	1,824
Dalton, Ga.	Georgia Power Co.	Wholesale	17,868
LaFayette, Ga.	Georgia Power Co.	Wholesale	5,888
Lyerly, Ga.	Georgia Power Co.	Retail	409
Ringgold, Ga.	Georgia Power Co.	Retail	1,311
Summerville, Ga.	Georgia Power Co.	Retail	4,706
Trion, Ga.	Georgia Power Co.	Retail	2,227
Tunnel Hill, Ga.	Georgia Power Co.	Retail	*
Bardwell, Ky.	Kentucky Utilities Co.	Wholesale	1,067
Beech Creek, Ky.	Kentucky Utilities Co.	Retail	240
Beechmont, Ky.	Kentucky Utilities Co.	Retail	370
Belton, Ky.	Kentucky Utilities Co.	Retail	175
Brower, Ky.	Kentucky Utilities Co.	Retail	300
Caneyville, Ky.	Kentucky Utilities Co.	Retail	278
Cayce, Ky.	Kentucky Utilities Co.	Retail	125
Clarkson, Ky.	Kentucky Utilities Co.	Retail	645
Clinton, Ky.	Kentucky Utilities Co.	Retail	1,647
Columbus, Ky.	Kentucky Utilities Co.	Retail	357
Crofton, Ky.	Kentucky Utilities Co.	Retail	892
Crutchfield, Ky.	Kentucky Utilities Co.	Retail	140
Fulton, Ky.	Kentucky Utiliteis Co.	Wholesale	3,265
Hickman, Ky.	Kentucky Utilities Co.	Retail	1,537
Jordan, Ky.	Kentucky Utilities Co.	Retali	30
Leitchfield, Ky.	Kentucky Utilities Co.	Retail	2,982
Mammoth Cave, Ky.	Kentucky Utilities Co.	Retail	50
Millwood, Ky.	Kentucky Utilities Co.	Retail	160
Park City, Ky.	Kentucky Utilities Co.	Retail	497
West Clifty, Ky.	Kentucky Utilities Co.	Retail	25
Carthage, Miss.	Miss. Power and Light Co.	Retail	2,442
Charleston, Miss.	Miss. Power and Light Co.	Retail	2,528
Cockrum, Miss.	Miss. Power and Light Co.	Retail	75
Coldwater, Miss.	Miss. Power and Light Co.	Retail	1,264
Como, Miss.	Miss. Power and Light Co.	Retail	789
Courtland, Miss.	Miss. Power and Light Co.	Retail	242
Crenshaw, Miss.	Miss. Power and Light Co.	Retail	1,382
Enid, Miss.	Miss. Power and Light Co.	Retail	128
Harpersville, Miss.	Miss. Power Co.	Retail	250
Hernando, Miss.	Miss. Power and Light Co.	Retail	1,898
Hillsboro, Miss.	Miss. Power Co.	Retail	*
Independence, Miss.	Miss. Power and Light Co.	Retail	159
Kosciusko, Miss.	Miss. Power and Light Co.	Wholesale	6,800

Town and State	Supplied By	Wholesale or Retail	Population
Lake, Miss.	Miss. Power Co.	Retail	297
Lena, Miss.	Miss. Power Co.	Retail	307
Lillian, Miss.	Miss. Power Co.	Retail	*
Love, Miss.	Miss. Power and Light Co.	Retail	500

[fol. 1214]

Nesbitt, Miss.	Miss. Power and Light Co.	Retail	125
Neshoba, Miss.	Miss. Powel Co.	Retail	50
Oakland, Miss.	Miss. Power and Light Co.	Retail	488
Pope, Miss.	Miss. Power and Light Co.	Retail	246
Sardis, Miss.	Miss. Power and Light Co.	Retail	2,098
Scobey, Miss.	Miss. Power and Light Co.	Retail	89
Tillatoba, Miss.	Miss. Power and Light Co.	Retail	102
Walnut Grove, Miss.	Miss. Power Co.	Retail	433
Arthur, Tenn.	Kentucky Utilities Co.	Retail	500
Harrogate, Tenn.	Kentucky Utilities Co.	Retail	800
Mount Carmel, Tenn.	Kingsport Power Co.	Retail	700
Shawnee, Tenn.	Kentucky Utilities Co.	Retail	200
Tiprell, Tenn.	Kentucky Utilities Co.	Retail	150
Ben Hur, Va.	Old Dominion Power Co.	Retail	400
Caylor, Va.	Old Dominion Power Co.	Retail	100
Dryden, Va.	Old Dominion Power Co.	Retail	500
Ewing, Va.	Old Dominion Power Co.	Retail	500
Gibson Station, Va.	Old Dominion Power Co.	Retail	100
Jasper, Va.	Old Dominion Power Co.	Retail	100
Jonesville, Va.	Old Dominion Power Co.	Retail	711
Kemmerer, Va.	Old Dominion Power Co.	Retail	150
Keokee, Va.	Old Dominion Power Co.	Retail	500
Pennington Gap, Va.	Old Dominion Power Co.	Retail	1,799
Rose Hill, Va.	Old Dominion Power Co.	Retail	600
St. Charles, Va.	Old Dominion Power Co.	Retail	368
Woodway, Va.	Old Dominion Power Co.	Retail	400

* Not Available

(1) Supplied in part by Georgia Power Company and in part by TVA.

[fol. 1215] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 40

Towns Presently Supplied by Investor Owned Electric Utilities Which Towns Lie Within Areas Partially, But Not Entirely Surrounded by TVA's Power Service Area as Such Area Is Shown on TVA's July, 1958 Transmission Service Map, Exhibit ——.

Town and State	Supplied By	Wholesale or Retail	Population
Attalla, Ala.	Alabama Power Co.	Retail	8,257
Gadsden, Ala.	Alabama Power Co.	Retail	58,088
Glencoe, Ala.	Alabama Power Co.	Retail	2,592
Hokes Bluff, Ala.	Alabama Power Co.	Retail	1,619
Keener, Ala.	Alabama Power Co.	Retail	105
Murrycross, Ala.	Alabama Power Co.	Retail	125
Norton, Ala.	Alabama Power Co.	Retail	150
Menlo, Ga.	Georgia Power Co.	Retail	466
New England, Ga.	Georgia Power Co.	Retail	*
Rising Fawn, Ga.	Georgia Power Co.	Retail	300
Trenton, Ga.	Georgia Power Co.	Retail	1,301
Ethel, Miss.	Miss. Power and Light Co.	Retail	566
McCool, Miss.	Miss. Power and Light Co.	Retail	211
Union, Miss.	Miss. Power Co.	Retail	1,726
Blair Gap, Tenn.	Kingsport Power Co.	Retail	*
Bloomingdale, Tenn.	Kingsport Power Co.	Retail	950
Cumberland Gap, Tenn.	Kentucky Utilities Co.	Retail	291
Kingsport, Tenn.	Kingsport Power Co.	Retail	26,314
Long Island, Tenn.	Kingsport Power Co.	Retail	1,925
Lynn Garden, Tenn.	Kingsport Power Co.	Retail	5,261
Morrison City, Tenn.	Kinsgport Power Co.	Retail	2,426
Ridgefield, Tenn.	Kingsport Power Co.	Retail	400
Sullivan Gardens, Tenn.	Kingsport Power Co.	Retail	950

* Not Available

[fol. 1216] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 48

KU 17-11 (ES-2) 2-58

K.U. Office, New Tazewell, Tenn.
Route No. —
Acct. No. —

Contract for Electric Service

This contract and agreement made and entered into this 28th day of Sept. 1962 by and between the Kentucky Utilities Company, hereinafter called "Company" and Dayton Shockley, Tazewell, Tenn., hereinafter called "Customer".

Witnesseth: For a period of 1 year, beginning Approx. October 1, 1962 and subject to the Company's general Rules and Regulations or Terms and Conditions, the Company will sell and deliver to Customer at Company meter located on customer's Residence, and Customer will receive and pay for electric energy for the operation of Electric Heat (Baseboard). If Customer continues service after the expiration of the above period this contract automatically will be renewed in accordance with provisions of the rate schedule.

The energy will be delivered as 1 phase, 60 cycle, alternating current of a nominal voltage of 120/240 volts at the point of delivery and in the amount of approximately 14 kilowatts, consisting of —— Horse Power Power and —— KW Lighting, and 14 KW Resistance Heat.

All energy taken under this agreement will be measured as Secondary Service.

The Customer may from time to time cause to be increased the amount of energy to be delivered hereunder by making written request upon the Company, stating the amount of additional energy desired, such request to be made at least 90 days prior to the time such additional energy is required by the Customer.

Each month the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to the Customer during the preceding month or bi-month determined in accordance with rate schedule number 33, which is made a part of this contract. The minimum bill will be as provided in the rate schedule but not less than $100.00 a Year.

A "month" or "bi-month" as used in this contract will mean the period between any two consecutive regular readings by the Company of the meters at the Customer's premises, such readings to be taken as nearly as may be practicable every thirty days for "month" or every 60 days for "bi-month".

Where rate schedule has optional clause and/or service is metered at other than delivered voltage, and/or minimum other than standard minimum is required, give explanation hereon.

This Rate is a Rider to the RS-3 Rate Schedule:
Minimum Billing to be applied as follows: (If Applicable)

November—10%	February—20%
December—20%	March—20%
January—20%	April—10%

Rules and Regulations

It is mutually agreed that the Company's general Rules and Regulations or Terms and Conditions and rate applicable to the service supplied hereunder, which are on file with the Public Service Commission of Kentucky, are made a part of this contract as fully as if written herein.

In Witness Whereof, the parties hereto have caused this contract to be executed by these duly authorized representatives this day and year shown above.

Kentucky Utilities Company.	Dayton Shockley, Customer.
By H. B. Asher, Division Mgr., Official Capacity.	By ——, ——. ——, ——, Official Capacity.
Attest: —	Attest: —

SKYVUE RESTAURANT 10-31-63

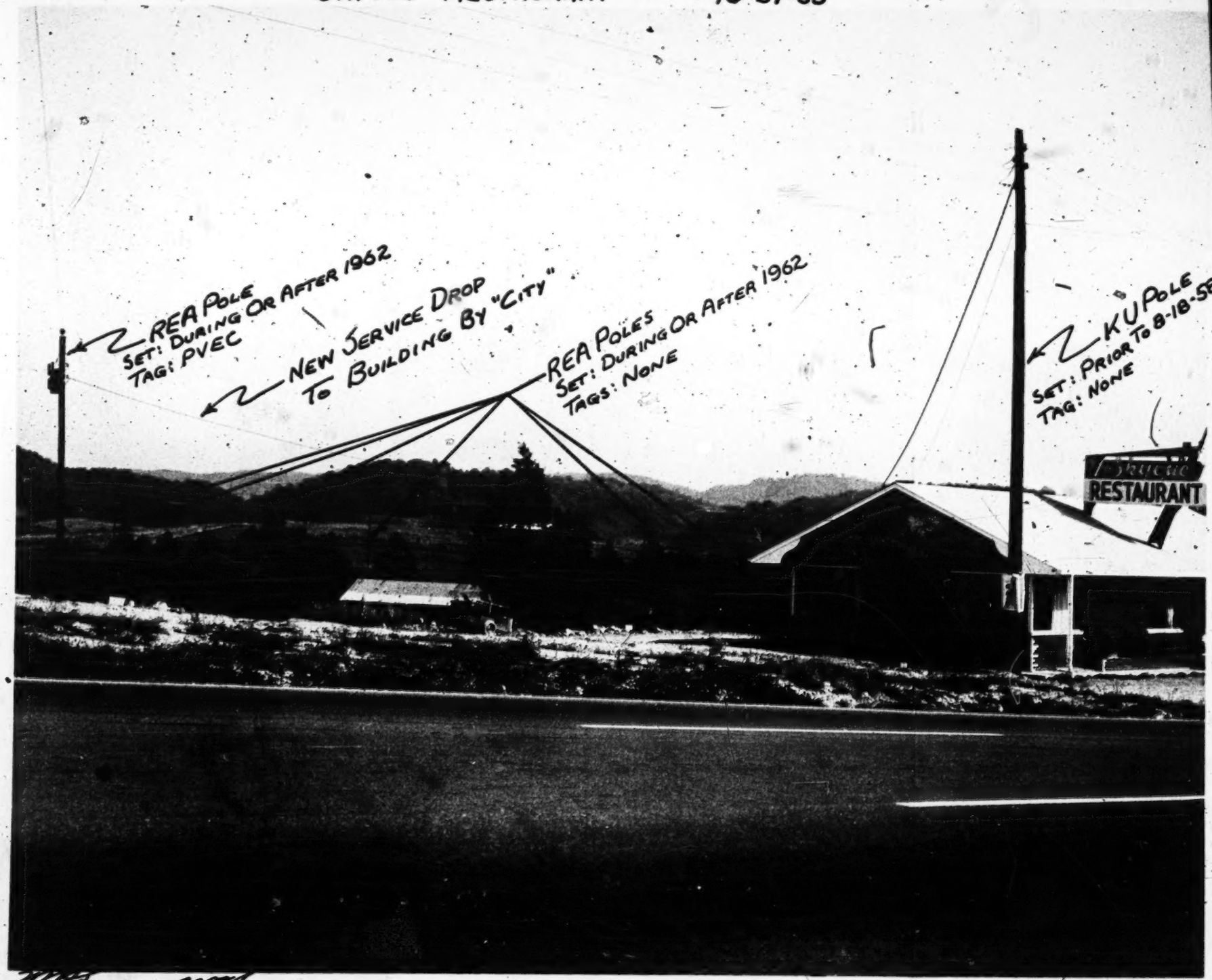


EXHIBIT No. 50

T CRAFT MARINE SUPPLY CO.
(OLD AND NEW BUILDINGS)

10-31-63



MKR Wds

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 52

MOSSIE KECK AND DANA DAY RESIDENCES 10-31-63

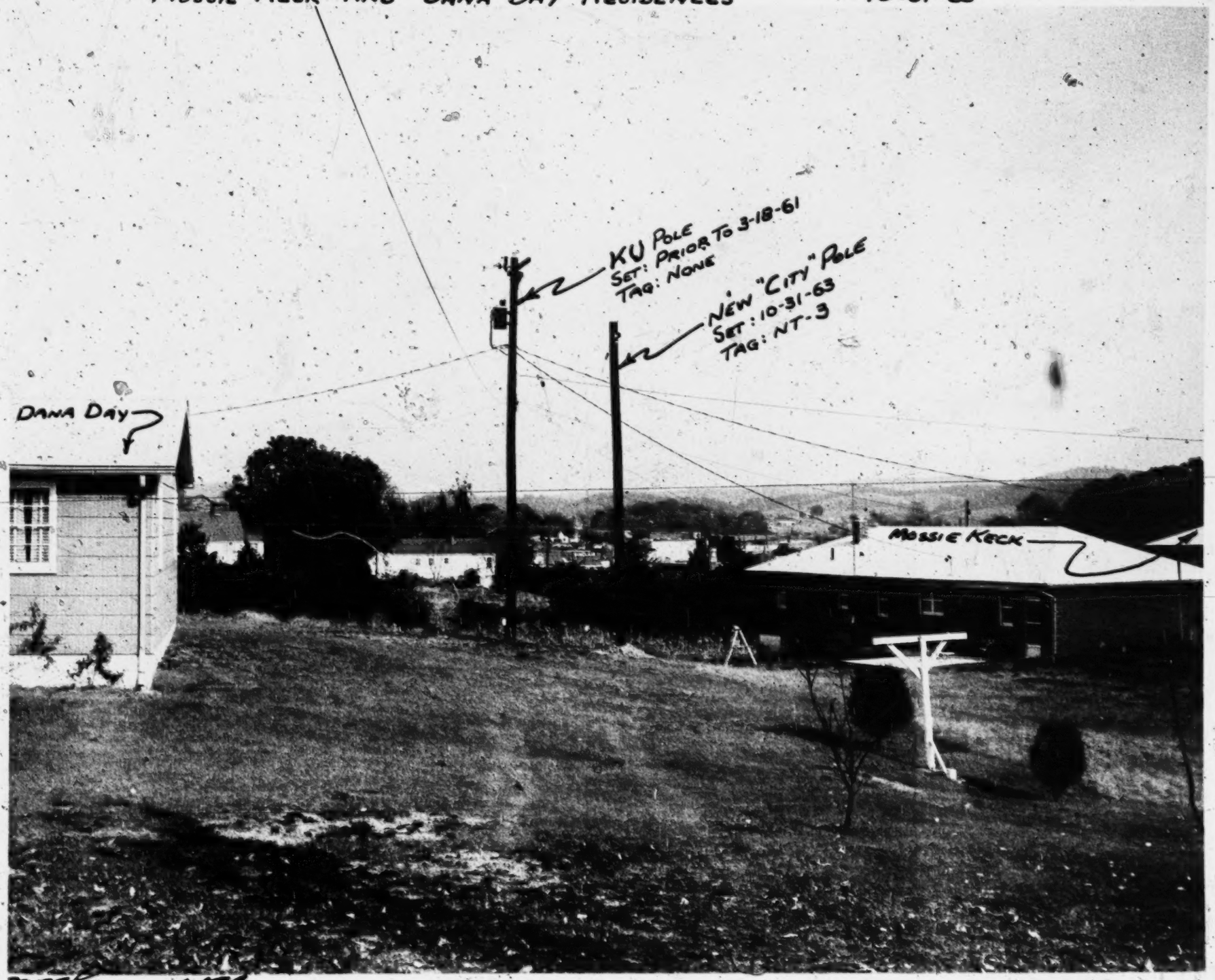


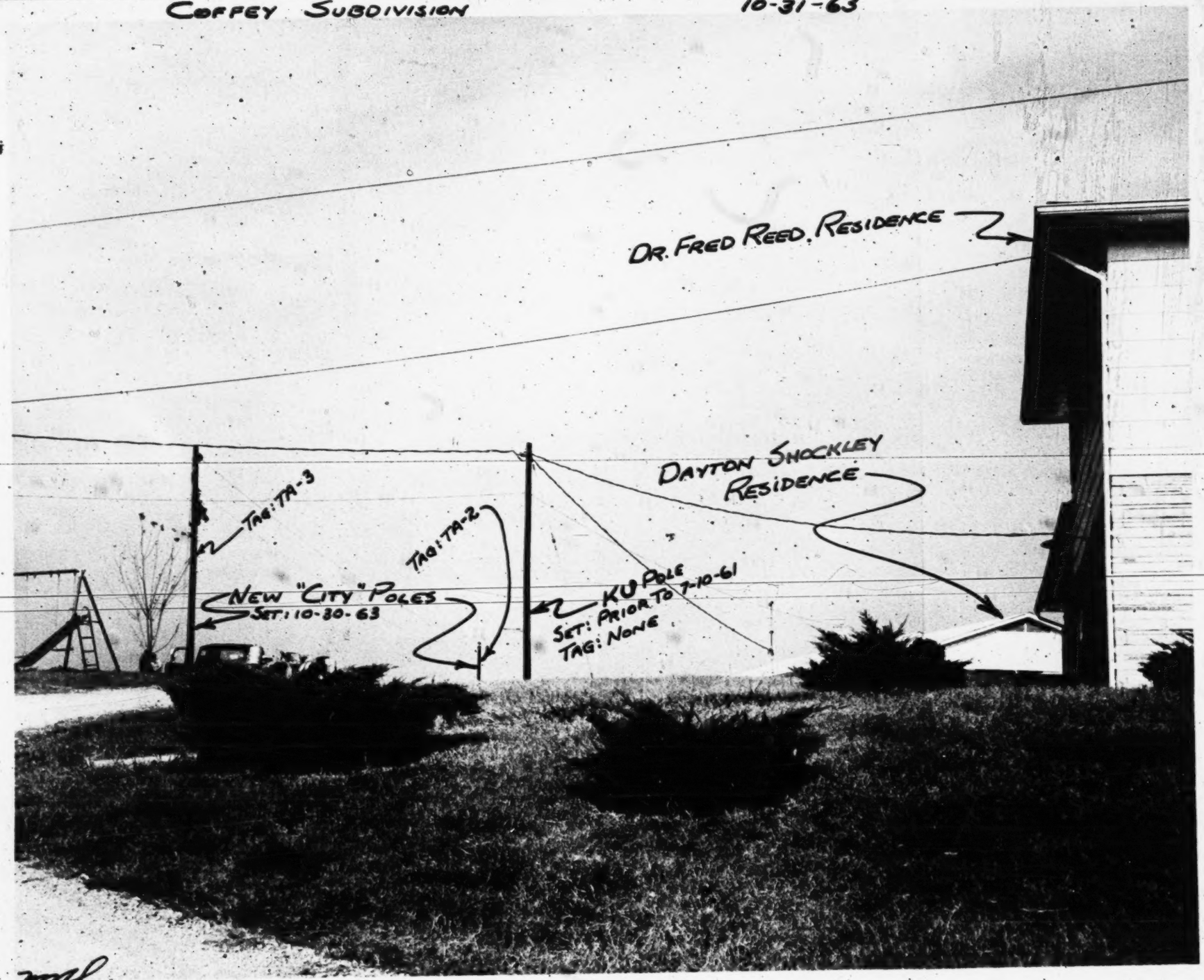
Exhibit No. 51



[101. 1221]

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 53



[illegible]

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 54

DARRELL CAMPBELL RESIDENCE 10-31-63

(KU SERVICE FROM REAR)



[illegible]

[101. 1225]

IN UNITED STATES DISTRICT COURT

EXHIBIT No. 55

BROOKS FURNITURE MFG. CO. 10-31-63

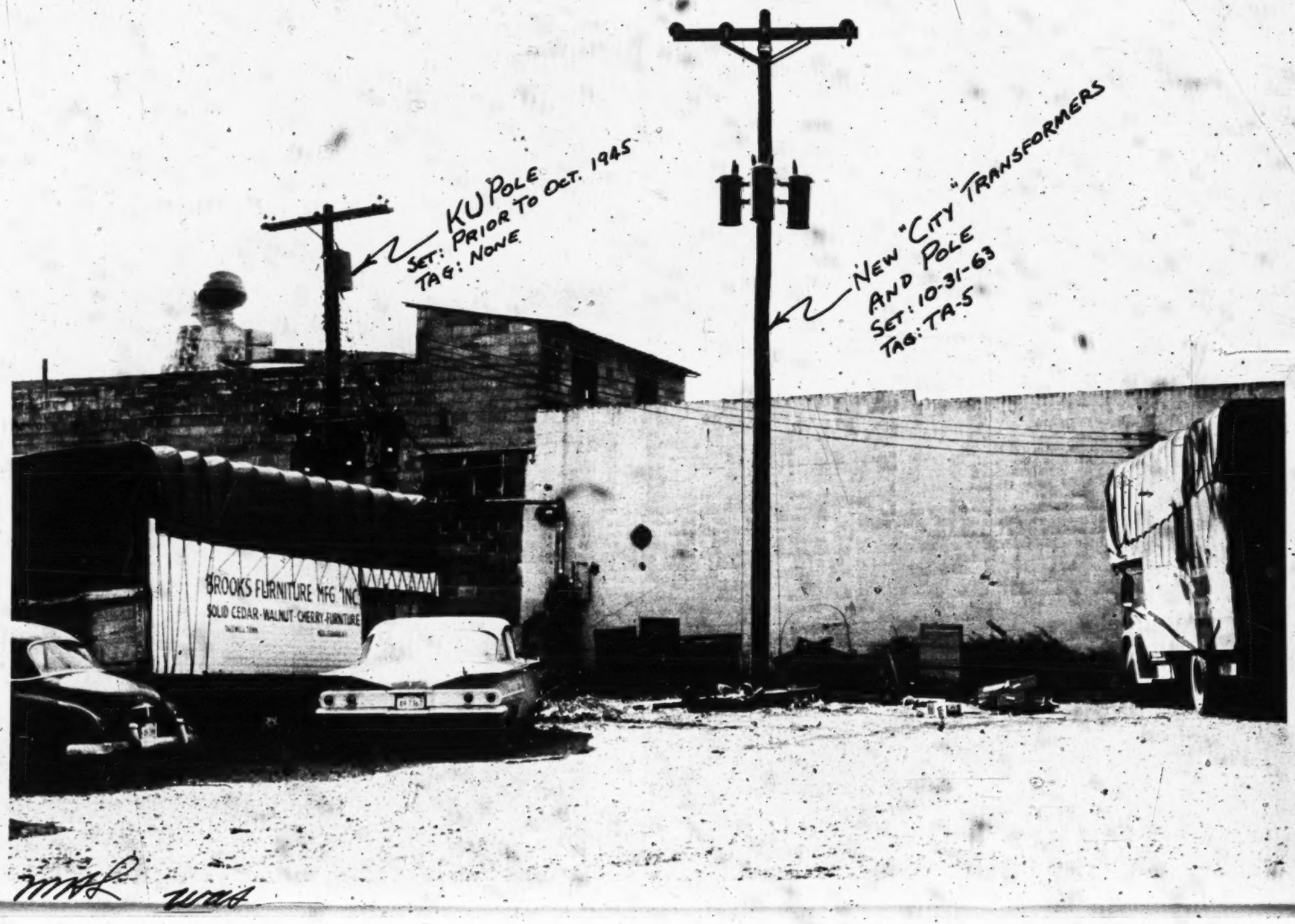
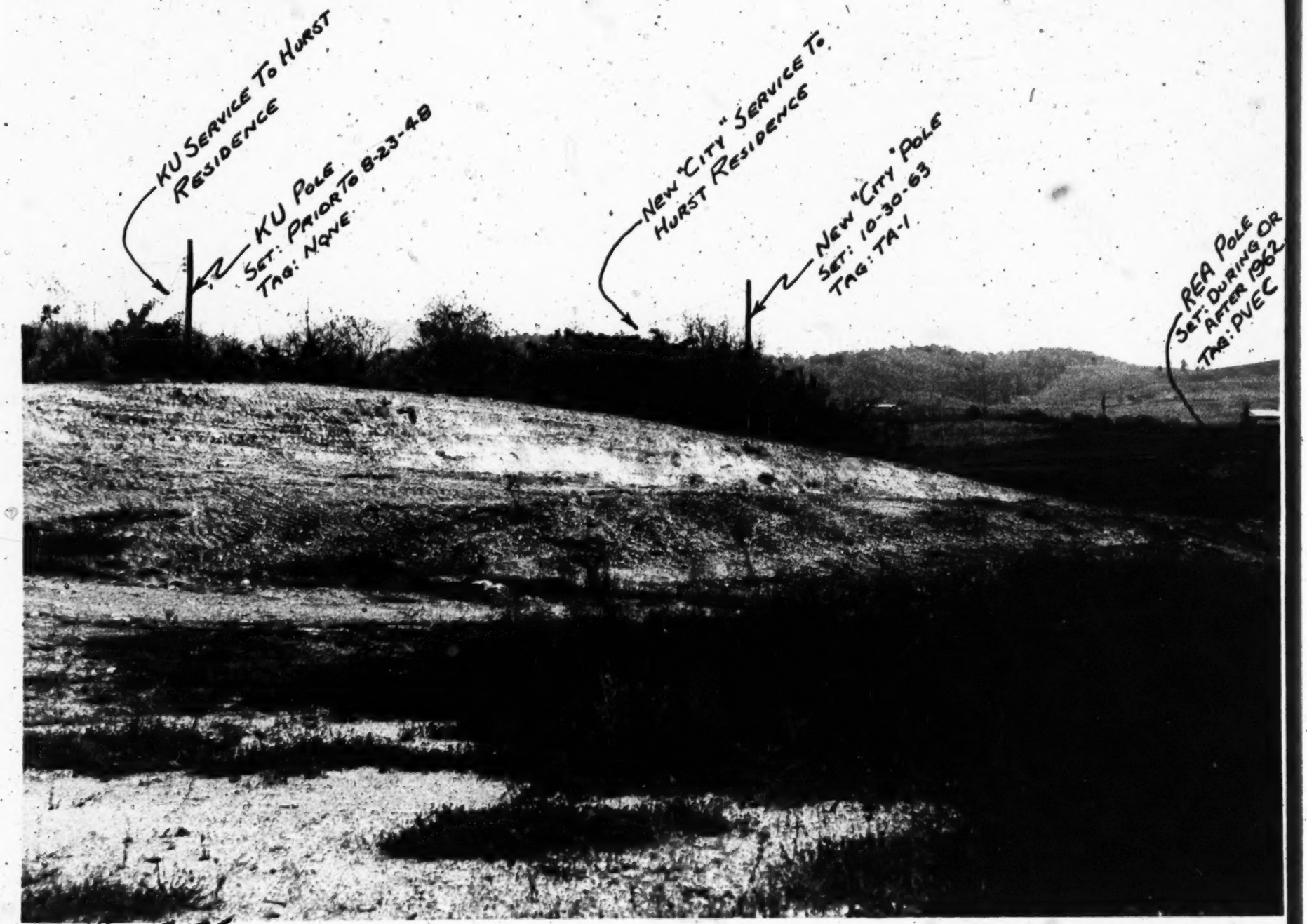


EXHIBIT No. 56

CECIL HURST RESIDENCE (OVER HILL) 10-31-63

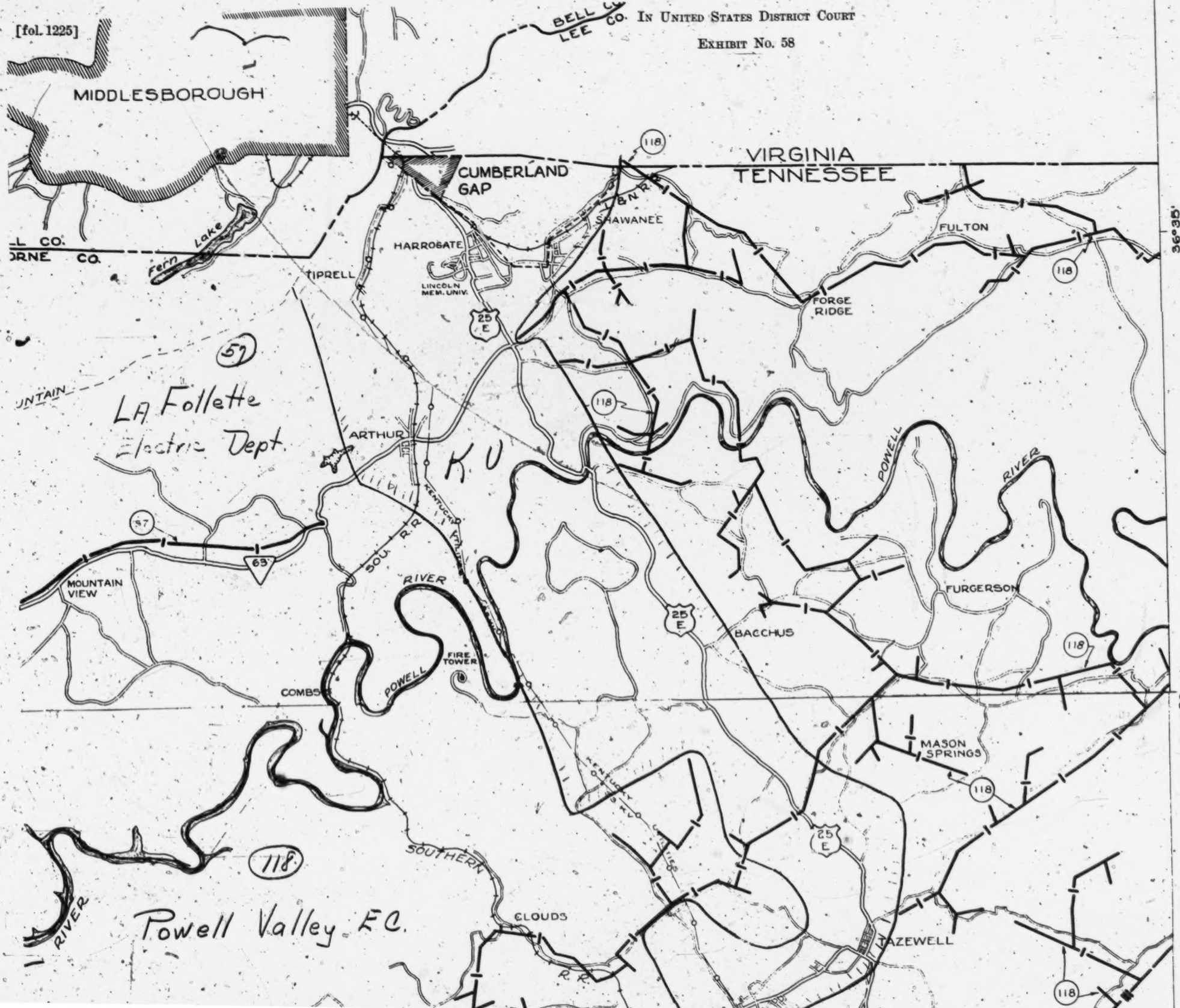


MMK 4084

[fol. 1225]

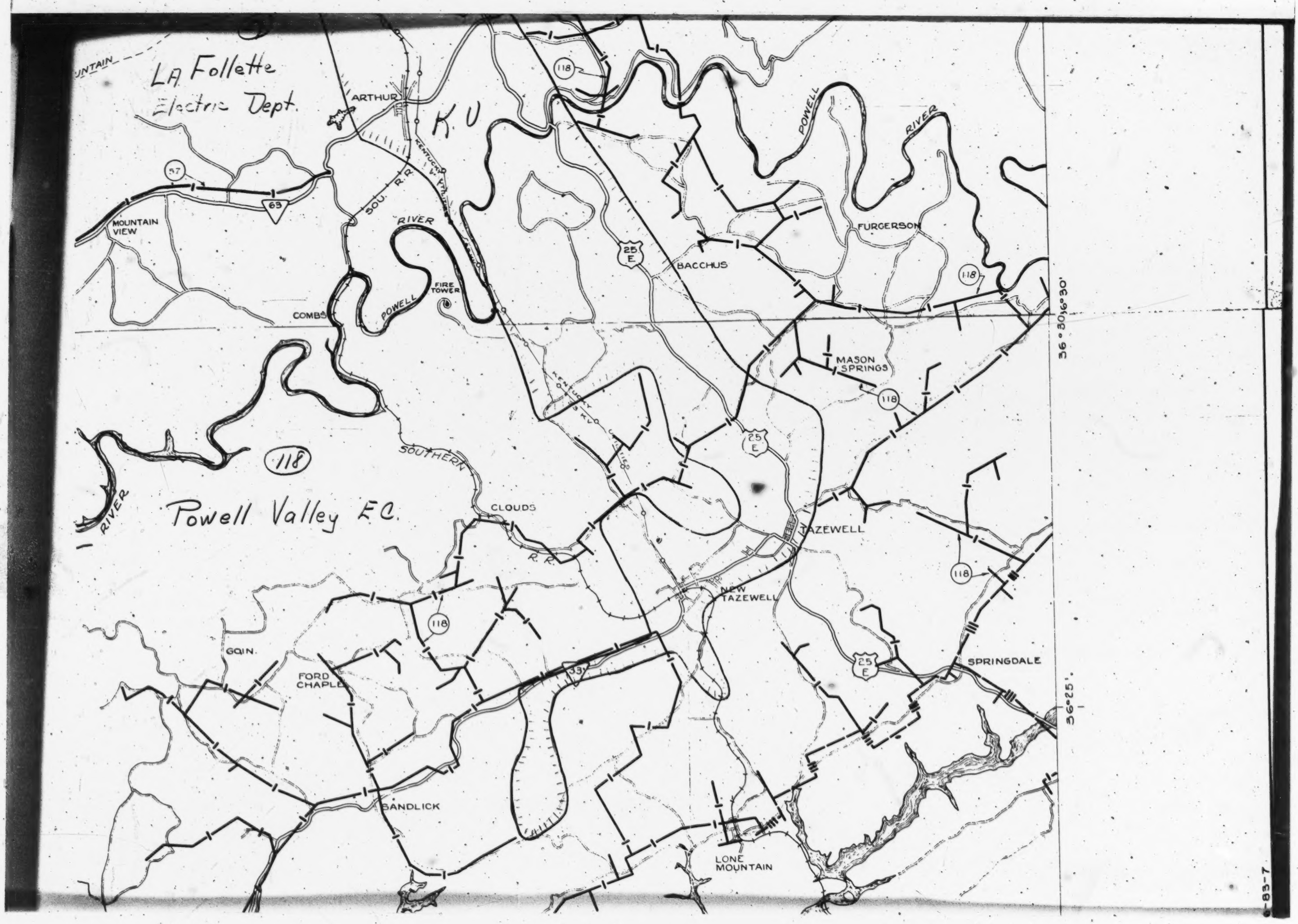
In United States District Court

Exhibit No. 58

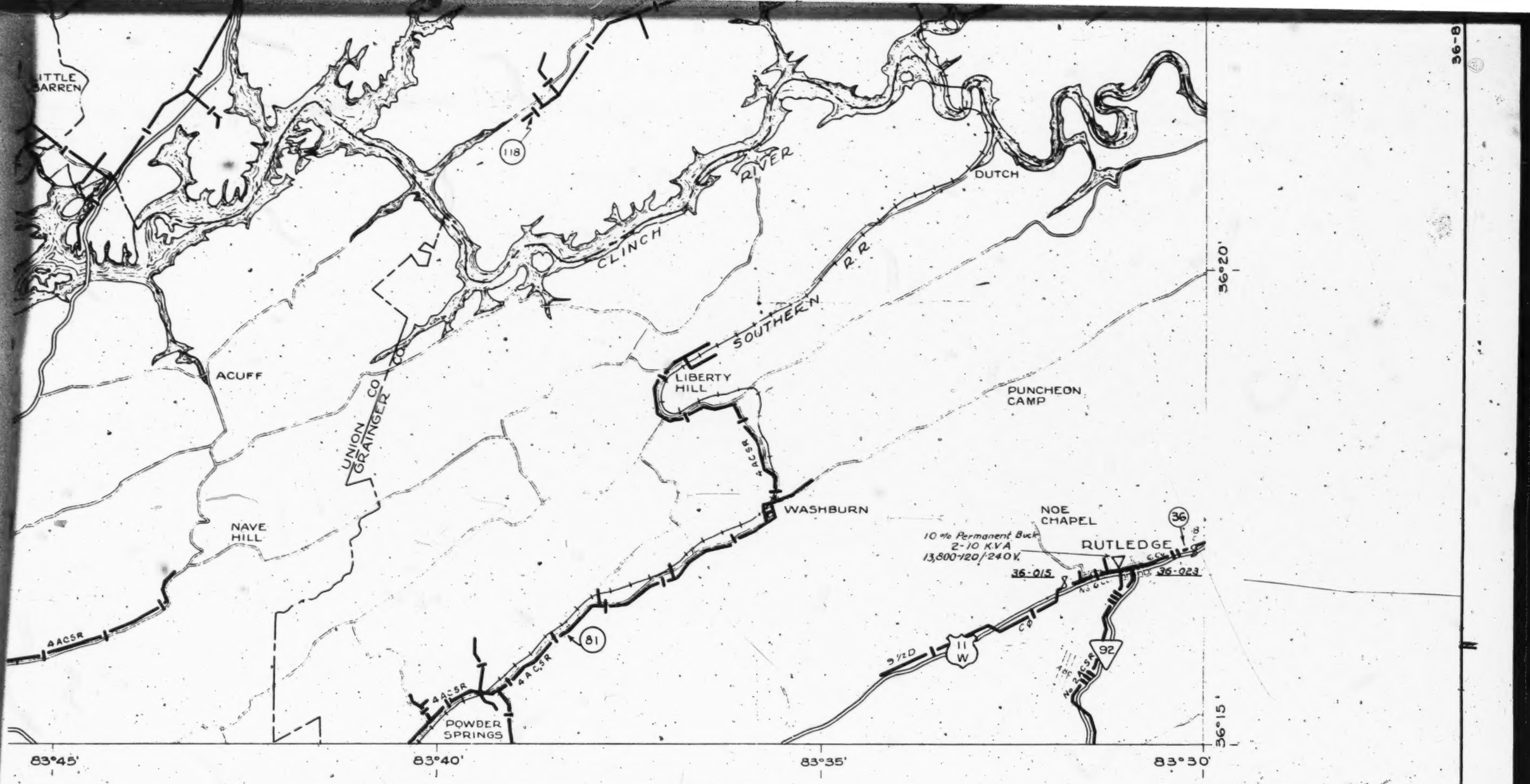


LA Follette
Electric Dept.

Powell Valley E.C.



6-83-7



COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA

(36) APPALACHIAN ELECTRIC COOPERATIVE

(81) KNOXVILLE ELECTRIC POWER AND WATER BOARD

(57) LA FOLLETTE ELECTRIC DEPT.

(118) POWELL VALLEY ELECTRIC COOPERATIVE

1	General Revision	C.B.	J.H.

TENNESSEE VALLEY AUTHORITY

DEPARTMENT OF OPERATIONS

TRANSMISSION AND RURAL DISTRIBUTION LINES IN CAMPBELL, CLAIBORNE, UNION AND GRAINGER COUNTIES, TENNESSEE

DATE: 11-30-44	SUBMITTED: F. F. Thompson	APPROVED: H. O. Weber	36-83-3.
DRAWN: Z.K.S.			L-C-7000
TRACED: Z.K.S.			
CHECKED:			

[fol. 1226] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 68

Attachment of 10-17-62.

Mr. Dewey S. Hunter, Executive Director
The LaFollette Housing Authority
Bluff Road
LaFollette, Tennessee

Dear Mr. Hunter:

We wish to acknowledge receipt of your letter of February 27 relative to this Cooperative serving electricity to the proposed housing projects in New Tazewell and Tazewell, Tennessee.

Several weeks ago I looked over the site that your Authority had purchased in New Tazewell, and upon returning to our office I found that it was not in the territory which we are allowed to furnish service. It is true that we sell electricity under Standard TVA Rates which are much lower than the rates in this area for those consumers receiving service from the Kentucky Utilities Company.

If you have not purchased your building site in the Tazewell area, we will be glad to furnish you with a map of the area in and around Tazewell which we are allowed to furnish service. As you know, the areas which public utilities can serve come under the jurisdiction of the State Utilities Commission or Tennessee, and whether we like it or not, these restrictions must be strictly adhered.

We would certainly like to serve these housing projects as we have the electricity available in this area and it would improve our winter load immensely.

Sincerely yours, S. E. Berry, Manager, Powell Valley Electric Cooperative.

FEB [Copy Illegible]

[fol. 1227] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 69

The LaFollette Housing Authority
Bluff Road
LaFollette, Tennessee

Members of the Board:
R. L. Sharp, Chairman
Clarence E. Farris, Vice Chairman
Floyd Parrott
R. L. Alexander
H. M. Irwin

Dewey Hunter, Executive Director
Reba S. Davis, Asst. Director

Attachment of 10-17-62.

Mr. S. E. Berry
REA Office
Jonesville, Virginia

Dear Mr. Berry:

We plan to build two low-rent housing projects, one in New Tazewell and the other in Tazewell. The total number of units for both projects will be fifty-eight. Someone told us that we would have to secure our utilities from the Kentucky Utilities Company. We don't like this because with the rate that they have we feel that it would be impossible for us to heat these units with electricity. We have eight projects comprising several hundred units and they are all completely electric. We would hate to change this for New Tazewell and Tazewell, so won't you please take under advisement our request and see if there isn't some way that you can furnish the electricity for these two projects. Since these are public housing projects, I am sure you know that we are under the supervision of the government, and I know that the Public Housing Administration would be pleased to have you serve these two projects.

Sincerely yours, The LaFollette Housing Authority.
Dewey S. Hunter, Executive Director.

DSH:mc

POWELL VALLEY ELECTRIC COOP

COOPERATIVE ELECTRICITY

JONESVILLE, VIRGINIA

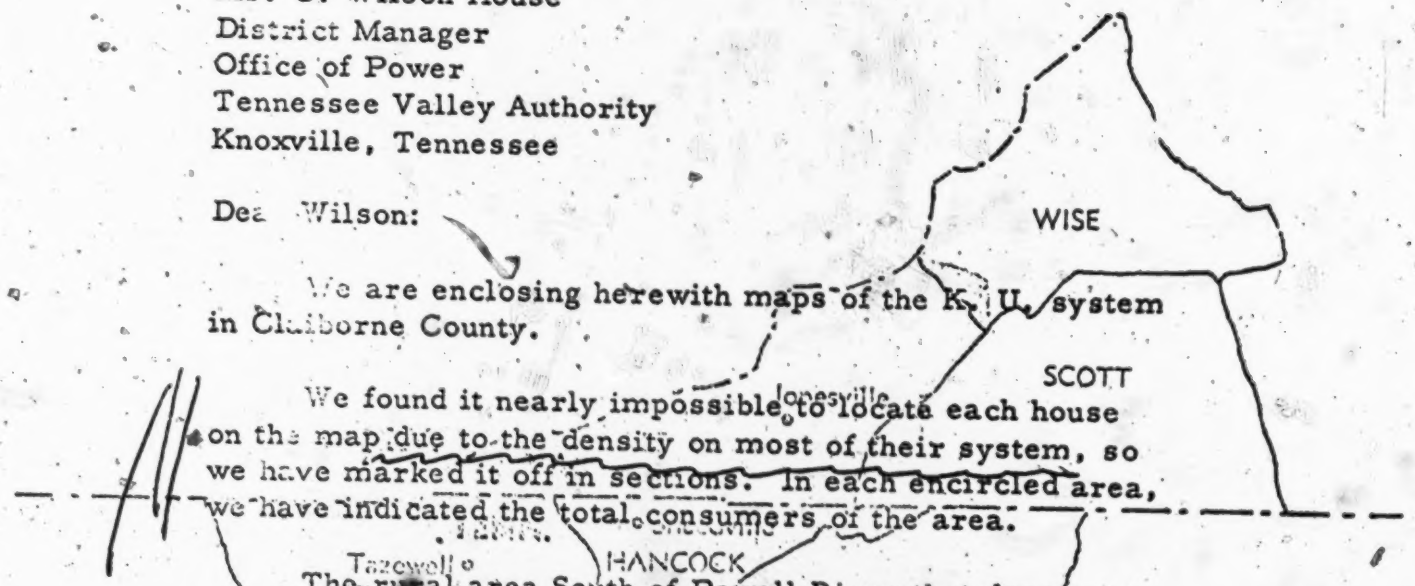
TELEPHONE JONESVILLE 52

December 26, 1963

Mr. C. Wilson House
District Manager
Office of Power
Tennessee Valley Authority
Knoxville, Tennessee

Dear Wilson:

We are enclosing herewith maps of the K. U. system in Claiborne County.



We found it nearly impossible to locate each house on the map due to the density on most of their system, so we have marked it off in sections. In each encircled area, we have indicated the total consumers of the area.

The rural area South of Powell River that does not have a line drawn around it contains a total of 289 consumers. In this area, we have located a part of the houses but this was done only to give you some idea of the density

EXHIBIT No. 83

POWELL VALLEY ELECTRIC COOP

COOPERATIVE ELECTRICITY

JONESVILLE, VIRGINIA

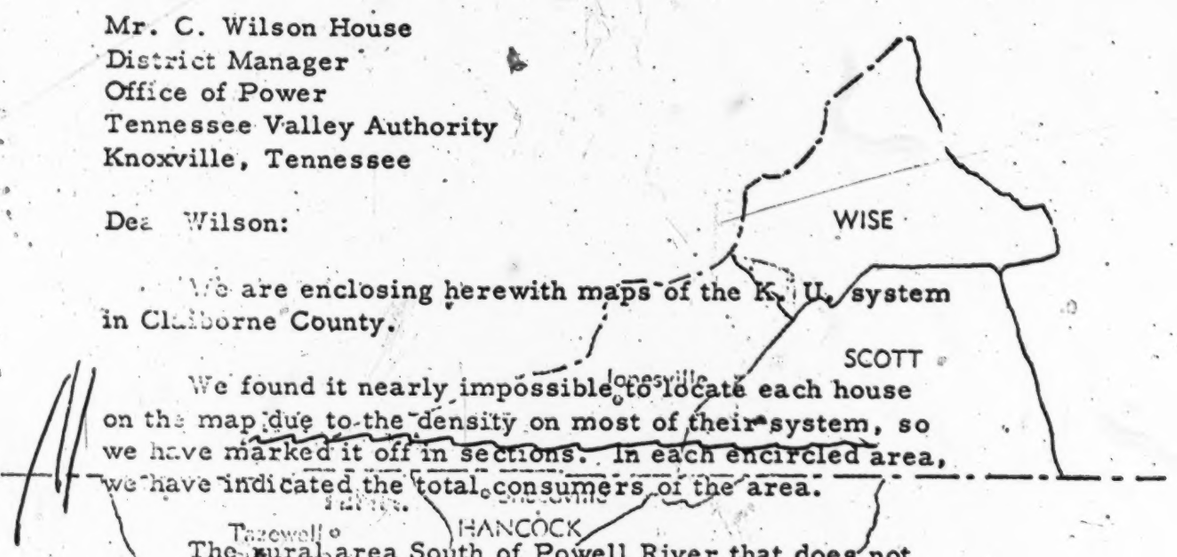
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The rural area South of Powell River that does not have a line drawn around it contains a total of 289 consumers. In this area, we have located a part of the houses but this was done only to give you some idea of the density in these areas. These do not add to the 289 figure given above, neither do any others that have been dotted in.

We have indicated a three phase line by making three short marks across the lines, a single phase by one such mark. Taps not marked at all are single phase No secondary is shown.

RALPH B. MINER
Manager

BOARD OF DIRECTORS

CLYDE Y. CRIDLIN
Attorney

C. F. STEELE, President, Blackwater, Va.
C. H. SLEMP, Dryden, Va.
LOYD MUNCY, Vice President, Harrogate, Tenn.
OBIE YEARY, Ewing, Va.
O. C. ALBERT, Secretary-Treasurer, Jonesville, Va.
DR. JOHN PEARSON, [illegible], Tenn.
O. I. SNODGRASS, [illegible]onesville, Va.
O. G. MOYERS, [illegible], Tenn.
RAY JARVIS, Sneedville, Tenn.

XEROX COPY
XEROX COPY

6-4-63

Everything North of Powell River now feeds from a new substation located in Harrogate. This was put into service at the same time as our new transformer at Tazewell. Everything on the South side of the river feeds from our substation at Tazewell.

We counted a total of 1,812 consumers on their system. This includes both the connected and disconnected houses. This was completed on December 20, or thereabouts.

Very truly yours,

Ralph B. Miner, Manager
POWELL VALLEY ELECTRIC COOPERATIVE

RBM:mrr

Enclosures

KNOXVILLE, TENNESSEE
RECEIVED
DEC 27 1963
OFFICE OF POWER
DIVISION OF POWER MARKETING
EASTERN DISTRICT

XEROX COPY

[fol. 1230] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 93

I, Edgar H. Drum, an Assistant Secretary of the Tennessee Valley Authority, hereby certify that the attached is a true and correct copy of the minutes of a meeting of the Board of Directors held on August 26, 1964, as approved by the Board of Directors at a meeting held on August 27, 1964.

In Witness, Whereof, I have hereunto set my hand and the official seal of the Tennessee Valley Authority this 18th day of September, 1964.

Edgar H. Drum.

[Seal.]

[fol. 1231] No. 912

Approved:

Charles J. McCarthy,
General Counsel and Secretary.

Minutes of Meeting of The Board of Directors, Tennessee Valley Authority, August 26, 1964

A special meeting of the Board of Directors of the Tennessee Valley Authority was held in the offices of the Corporation, 508 Union Avenue, Knoxville, Tennessee, at 9:30 a.m., August 26, 1964.

Present were A. J. Wagner, Director and Chairman; A. R. Jones, Director and Vice Chairman; Frank E. Smith, Director; L. J. Van Mol, General Manager; E. A. Shelley, Assistant General Manager; Charles J. McCarthy, General Counsel and Secretary; R. H. Marquis, Solicitor; G. O. Wessenauer, Manager of Power; Paul L. Evans, Director of Information; C. Wilson House, District Manager, and J. W. Ward, Jr., Administrative Assistant, of the Eastern District of the Division of Power Marketing; Lewis E. Wallace, Attorney; and Edgar H. Drum, an Assistant Secretary.

Chairman Wagner presided.

A waiver of notice of the meeting, properly executed by all of the Directors, was exhibited and ordered attached to these minutes.

[fol. 1232] The Board approved the minutes of the meeting held July 23, 1964.

Unclassified

912-1. *Availability of TVA Power in Claiborne County, Tennessee, Under Section 15d*

The following resolution was adopted by the Board:

Whereas, Section 15d of the Tennessee Valley Authority Act provides in part as follows:

> Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the

sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area . . . .

and

Whereas, Inquiries have been received as to the availability of TVA power in various parts of Claiborne County, Tennessee, and it appears desirable to make a finding as to the availability of TVA power under Section 15d of the Tennessee Valley Authority Act in Claiborne County and to determine precisely where the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, lies with reference to Claiborne County; and

Whereas, The information required to make such findings and determinations is now available to the Board; and

[fol. 1233] Whereas, The Board has considered the facts set out in the memorandum of August 25, 1964, from Mr. G. O. Wessenauer, Manager of Power, to the General Manager, and the legal views expressed in the memorandum of August 25, 1964, from Mr. Charles J. McCarthy, General Counsel, to the Board of Directors, copies of which are filed with the records of the Board as Exhibits 8-26-64a and 8-26-64b, respectively, and has examined the originals of the maps attached to Mr. Wessenauer's memorandum and maps showing areas in Claiborne County claimed by Kentucky Utilities, copies of which are filed with the records of the Board as Exhibit 8-26-64c and Exhibit 8-26-64b; and

Whereas, The Board has explored these questions fully in meetings with its Manager of Power and its General Counsel and other appropriate TVA staff, and has considered the questions in the light of such discussions, the above memoranda and maps, and the Board's own knowledge of TVA's operations and of the history of Section 15d of the Tennessee Valley Authority Act;

Now, Therefore, Be It Resolved, That the Board of Di-

rectors hereby finds and determines that all of Claiborne County, Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957;

Further Resolved, That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia, and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee, is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee.

The meeting was adjourned at 10:45 a.m.

Edgar H. Drum, Assistant Secretary.

[fol. 1234] Waiver of Notice of Meeting of Directors of the Tennessee Valley Authority

We, the undersigned, members of the Board of Directors of the Tennessee Valley Authority, do hereby severally waive notice of the time, place, and purpose of a meeting of the Directors, and consent that the meeting be held in the offices of the Corporation, 508 Union Avenue, Knoxville, Tennessee, on the 26th day of August, 1964, at 9:30 a.m. We further consent to the transaction of any and all business which may properly come before the meeting.

/s/ A. J. Wagner, Chairman. /s/ A. R. Jones, Director and Vice Chairman. /s/ Frank E. Smith, Director.

Dated: August 25, 1964

[fol. 1235] IN UNITED STATES DISTRICT COURT

EXHIBIT 8-26-64a

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

To: L. J. Van Mol, General Manager, 411 NSB, Knoxville (4)
From: G. O. Wessenauer, Manager of Power, 818 PRB, Chattanooga
Date: August 25, 1964
Subject: Determination by the TVA Board as to Whether All (or if Not All, What Part) of Claiborne County Is Within the Area for Which TVA or Its Distributors Were the Primary Source of Power Supply on July 1, 1957.

Section 15d of the TVA Act provides in parts as follows:

> Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area.

The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the entire area served by TVA power would justify the time and expense involved in making the necessary studies.

The pendency of the litigation filed by Kentucky Utilities Company in connection with service to Tazewell has given

rise to inquiries as to the availability of TVA power in various parts of Claiborne County. Inquiries have come from Chambers of Commerce, individuals desiring TVA power, members of Congress, and distributors of TVA power. In connection with this litigation it has been necessary to make a detailed study of the operations of the distributors of TVA power in Claiborne County. The information necessary to determine the answers to these questions has thus been collected and it is recommended that the Board consider the various data and make the determinations necessary to permit us to answer future inquiries more specifically than we have been able to do in the past. The facts which appear to be relevant are as follows:

TVA power is distributed in Claiborne County by the Powell Valley Electric Cooperative and the City of LaFollette electric system. The attached map shows the location of the distribution lines and the customers served by these [fol. 1236] distributors as of July 1, 1957. It will be seen that the lines of TVA distributors blanket Claiborne County except for the mountainous area, between the extreme northwestern part of the county served by LaFollette and Cumberland Mt. (which is without electric service except for a few customers served by Kentucky Utilities off a line running down Mingo Hollow) and a small area near the point where Kentucky, Tennessee, and Virginia come together embracing Cumberland Gap, Harrogate, and Shawanee. Kentucky Utilities provides service to power consumers in this area and it also provides service to most of the consumers in Tazewell and New Tazewell, to a group of consumers near Arthur, and to scattered rural consumers, most of whom are in the area immediately south of Powell River. As of July 1, 1957, Powell Valley and LaFollette supplied power to a total of 3,564 consumers in Claiborne County. On the same date Kentucky Utilities supplied power to 1,839 consumers. In June 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793, as against 626,043 kilowatt-hours for Kentucky Utilities. In the same month the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for Kentucky Utilities. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957, for Powell Valley and as of June 30, 1957, for LaFollette)

was $902,999.17 as against Kentucky Utilities, investment on June 30, 1957, of $457,947.93.

Also attached are maps presented to the Congress by TVA during the hearings on the bond financing bill. The map entitled "Tennessee Valley Authority, Major Construction Projects, April 1955" was supplied to the Senate Committee during the 1955 hearings. The map entitled "The TVA System, Dams and Steam Plants, January 1957" was supplied to the House Committee during the 1957 hearings. The untitled map, the original of which is colored blue, pink, and gray, was supplied to the House Committee during the 1959 hearings. Each of these maps is a composite of the approximate area served by the municipal and cooperative distributors of TVA power. The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA.

Also attached is a copy of a map furnished by Kentucky Utilities to the House Committee on Public Works on March 11, 1959, in connection with the bond financing legislation. So far as Claiborne County is concerned, this map differs from those supplied by TVA only in showing as outside the [fol. 1237] TVA area a small V-shaped portion of Claiborne County west of the point at which the Kentucky-Tennessee line turns north. This is the mountainous area which has no service except the Kentucky Utilities line running down Mingo Hollow. This map shows the cities of Tazewell, New Tazewell, and Cumberland Gap as within the TVA service area.

GOW:TGW:JEW:AP

Attachments

CC: Charles J. McCarthy, 629 NSB, Knoxville

CLERK'S NOTE:

Attachment—Map of Claiborne County, Tennessee, showing customers and lines of distributors of TVA power as of July 1, 1957 is omitted from the record here.

See Exhibit Volume I, Sheet 1b.

CLERK'S NOTE:

Attachment—Map—TVA Major Construction Projects, April 1955 presented by TVA witness to Subcommittee of the Senate Committee on Public Works during hearings on TVA Bond Financing Bill, July 1955 is omitted from the record here.

See Exhibit Volume I, Sheet 5b.

CLERK'S NOTE:

Attachment—Map—The TVA System, Dams and Steam Plants, January 1957 presented by TVA witness to a Subcommittee of the House Committee on Public Works during hearings on TVA Bond Financing Bill, March, April and May, 1957 is omitted from the record here.

See Exhibit Volume I, Sheet 6b.

CLERK'S NOTE:

Attachment—Map presented by TVA witness to House Committee on Public Works during hearings on TVA Bond Financing Bill, March 1959 is omitted from the record here.

See Exhibit Volume I, Sheet 7b.

CLERK'S NOTE:

Attachment—Map—Expansion of TV Service Area Under S. 931 and H.R. 3460 attached to statement filed by Kentucky Utilities with the House Committee on Public Works during hearings on TVA Bond Financing Bill, March 1959 is omitted from the record here.

See Exhibit Volume I, Sheet 8b.

[fol. 1238] IN UNITED STATES DISTRICT COURT

EXHIBIT 8-26-64b

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

To: Board of Directors
From: Charles J. McCarthy, General Counsel
Date: August 25, 1964
Subject: Determination by the TVA Board as to Whether All (or if Not All, What Part) of Claiborne County Is Within the Area for Which TVA or Its Distributors Were the Primary Source of Power Supply on July 1, 1957.

I have reviewed Mr. Wessenauer's memorandum to Mr. Van Mol on the above subject and I concur in his recommendation that the TVA Board make a determination as to the portion of Claiborne County which falls within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA Act is a responsibility which Congress has placed on the TVA Board. The question involved is basically a factual one to be determined in the light of the applicable law. Mr. Wessenauer has supplied the factual material and you have asked my advice as to the law.

The word "area" is not defined in section 15d of the TVA Act, but the use of the singular rather than the plural and the reference to the additional area extending "around the periphery of such area," as well as the legislative history, make clear that Congress was talking about a continguous area and that the mere furnishing of service by a private power company to customers located within the periphery of such area does not have the effect of excluding the parts of the area which the power company serves. Congress spoke of the primary source of power supply and not of the sole source of power supply. It did not intend that a private

power company could draw a circle around a group of customers or a community located inside the periphery of the TVA area and exclude the land within the circle from the area to which TVA is authorized to supply power. The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area [fol. 1239] for which TVA or its distributors were the primary source of power supply on July 1, 1957. A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell counties.

Charles J. McCarthy.

CJM:es

cc: Mr. L. J. Van Mol, 411 NSB,
Mr. G. O. Wessenauer, 818 PRB, Chattanooga,
Mr. C. Wilson House, 26 UAB.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

UNITED STATES
TENNESSEE VALLEY AUTHORITY
MAPS AND SURVEYS BRANCH

Ea, 8-26-64c

TENNESSEE-VIRGINIA
15 MINUTE SERIES (TOPOGRAPHIC) 7.5-MI

Section No. 2:
Map No.

Ex. 8-26-64d

Map Showing Agreed Territorial Boundary Line Between Kentucky Utilities Co. And Powell Valley R.E.C.C. In Tenn.

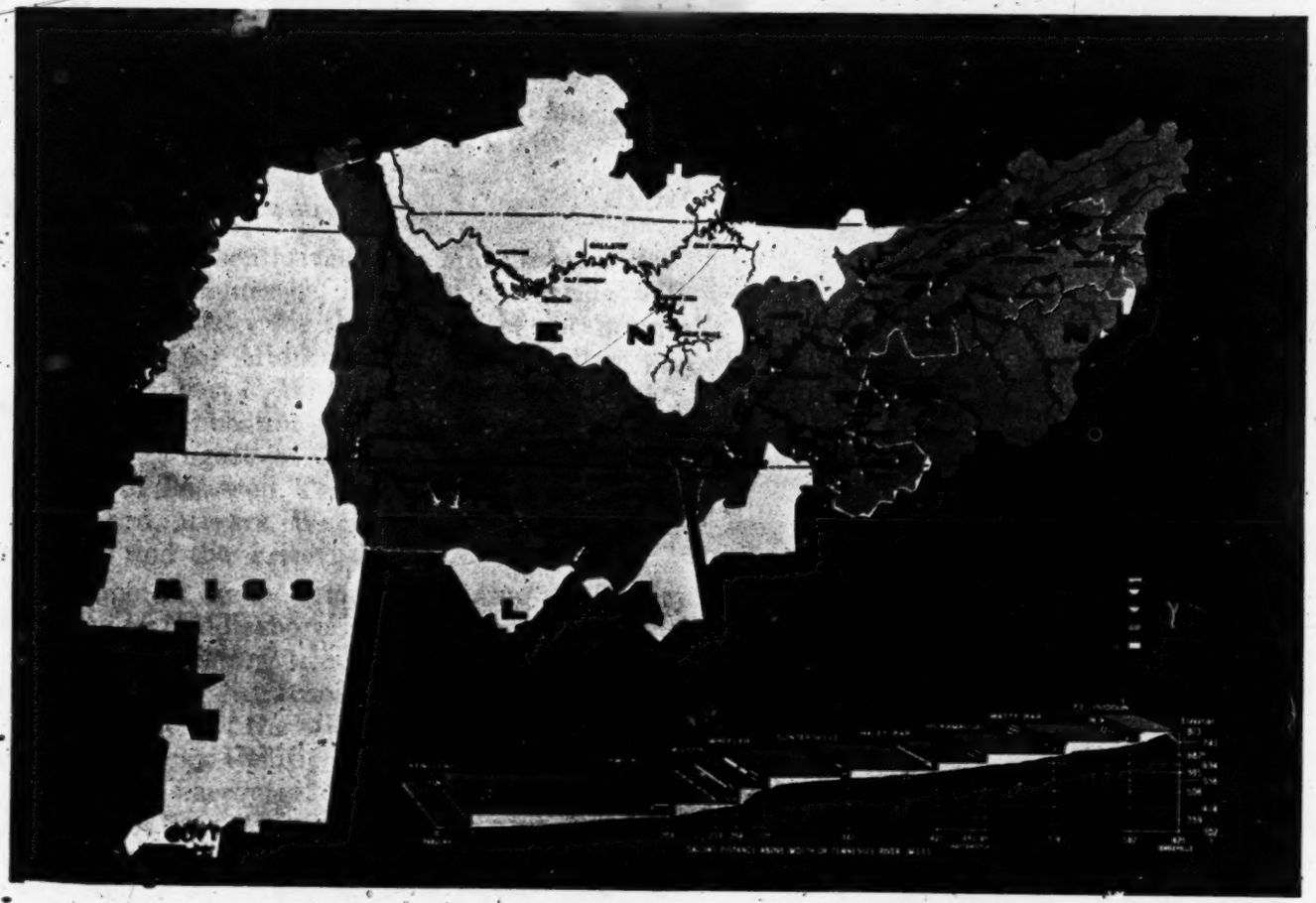
Section No. 1 Adjoins Kentucky Utilities Co.
Map No. 1 "
2 " "
Adjoins Powell Valley R.E.C.C.
1 "
2 "

CLOUDS TENN.

TAZEWELL TENN.

Shaded Area Designates K.U. Territory
Field Work By C. [illegible] & Assoc
7-1-64

EXHIBIT No. 97



[fol. 1243] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 98

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

To: Manager's Files, Chattanooga
From: James E. Watson, Director of Power Marketing, Chattanooga
Date: February 17, 1960
Subject: Middlesboro—Tazewell

On February 4th representatives from Middlesboro, Kentucky, and Tazewell, Tennessee, attended a meeting with the TVA Board, supposedly for the purpose of obtaining a TVA power contract for Middlesboro. The meeting was attended by Mayor Hubert F. White of Middlesboro, Messrs. Lee Campbell, Lee Rennebaum and R. R. Long, all of Middlesboro; Mr. Tom Fugate of Ewing, Virginia; and Mr. Lawrence Russell of Tazewell, Tennessee. TVA was represented by the Board, Messrs. Wagner, McCarthy, Wessenauer, Kampmeier and the writer.

Mayor White opened the meeting by outlining the history of electric service in Middlesboro in much the same way as described in the brief history which the Mayor had sent to General Vogel with his [attached] letter of February 1, 1960. At the conclusion of the historical review, the Mayor stated that the Kentucky Utilities Company was now offering to pay the City 3 percent of the Company's gross revenues derived within the City in return for a new franchise. Middlesboro, however, did not want to grant a franchise if there was any chance of obtaining TVA power and they, therefore, were requesting a contract with TVA.

General Vogel explained to the Middlesboro delegates that TVA was very sympathetic with the City's position, but since the passage of the TVA Finance Bill, it was now prevented by law from serving them. The Mayor stated that it had been their feeling and that of Senator Cooper that Middlesboro was eligible for TVA power because the City was within five miles of the area served by TVA power on July 1, 1957. Mr. McCarthy, therefore, explained the language of

the Act which specifically excludes service to a municipality outside of the service area as of July 1957. The Mayor then asked if it would be possible for the City to build its own generating plant and later get TVA power. Mr. McCarthy replied that this would not be possible without a change in the TVA Act. General Vogel suggested that the City's representatives talk to Senator Cooper about the matter since legislation was required. Mr. Russell of Tazewell asked if it would be possible for them to have a TVA power contract and the TVA representatives explained that it would be legally possible because Tazewell was well within the area served by TVA power on July 1, 1957. The total population of Tazewell and New Tazewell, however, is only about 4,500 people which would be too small to support a separate electric system, and it was suggested that Tazewell might wish to talk to the Powell Valley Electric Cooperative about getting TVA service through that organization.

[fol. 1244] Mr. Campbell stated that all of the representatives present were interested in TVA's building a steam plant near Middlesboro. They suggested a site at a point where the Southern Railroad crosses the Powell River near the town of Arthur, Tennessee. They explained that this particular site had access to large coal reserves and large quantities of water. General Vogel explained that we had not yet made a determination as to the site of our next steam plant; that we were making our usual engineering and economic studies to determine the site which would provide the cheapest source of power to the people of the Tennessee Valley, and that our determination of the location would be based strictly on these cost figures. All agreed that this was the proper procedure for locating a plant and Mr. Campbell stated that they just wanted to be sure that their area was not overlooked in our studies.

J. E. W.

CC: P. S. Button, 809 Pr. B.,
Paul Evans, Knoxville,
R. A. Kampmeier, 830 Pr. B.,
C. J. McCarthy, Knoxville,
George P. Palo, Knoxville,
A. J. Wagner, Knoxville (4),
G. O. Wessenauer, 818 Pr. B.

[fol. 1245] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 99

TV-14190A

Agreement Among Tennessee Valley Authority, Powell Valley Electric Cooperative and Kentucky Utilities Company

This Agreement, made and entered into as of the 8th day of Oct., 1952, by and among Tennessee Valley Authority (hereinafter called "TVA"), a corporation created and existing under and by virtue of the Tennessee Valley Authority Act of 1933 as amended, Powell Valley Electric Cooperative (hereinafter called "Cooperative"), a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Virginia, and Kentucky Utilities Company (hereinafter called "Company"), a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Kentucky;

Witnesseth:

Whereas, Cooperative and TVA have heretofore entered into an agreement in writing dated as of September 8, 1945 (which agreement as supplemented and amended is hereinafter called "Power Contract"), providing for the supply by TVA of Cooperative's electric power and energy requirements up to the maximum therein stated; and

Whereas, Cooperative's loads in the Tazewell, Tennessee, area have grown to such an extent that Cooperative is experiencing difficulty in supplying such loads over its 12.5 kv system from the Fitts Gap substation; and

Whereas, Company desires to establish an additional point of delivery of power in the Tazewell, Tennessee, area [fol. 1246] to the Company's subsidiary, the Dixie Power and Light Company, which is experiencing similar difficulty in supplying its loads in the Town of Tazewell, Tennessee; and

Whereas, the parties hereto now desire to enter into an agreement whereby the aforementioned difficulties may be relieved to their mutual benefit and economy;

Now, therefore, for and in consideration of the mutual

covenants herein contained and subject to the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto covenant and agree as follows:

1. Company shall construct, operate, and maintain at its sole expense, a transmission line from a point on Company's system at Cumberland Gap, Tennessee, to the substation to be constructed, in accordance with Section 2 hereof, on a site to be selected by representatives of the parties hereto and acquired by the Cooperative at its sole expense, at or near the Town of Tazewell, Tennessee.

2. Cooperative shall with due diligence construct, or cause to be constructed, and shall thereafter own, operate and maintain at its sole expense on the site to be acquired by it in accordance with Section 1 hereof, a substation of not less than 5,000 kva capacity with sufficient space therein for the ultimate installation of eight (8) 15 kv oil circuit breakers. The equipment to be installed is said substation by Cooperative shall include, without limitation by reason of specification, a 5,000 kva, or larger transformer bank suitable for 33 or 66 kv operation with a low tension rating of 7.2/12.45 kv wye; a 500 kva, or larger, 12.47 kv, plus or minus .10% voltage regulator with parallel winding for double capacity [fol. 1247] at plus or minus 5% regulation; such 15 kv oil circuit breakers as from time to time may be required by Cooperative for its use; one 15 kv oil circuit breaker for the Company's use; and a 60 minute interval recording demand and watthour meter which will register all power and energy taken by Cooperative at the low-tension side of said substation. The substation to be constructed pursuant to this section is hereinafter called "Tazewell Substation."

3. Cooperative shall reserve for Company's use 1,500 kva of Tazewell Substation's capacity, and Company shall install, or cause to be installed, and shall thereafter operate and maintain at its sole expense in Tazewell Substation a 60 minute interval recording demand and watthour meter which will register all power and energy taken by Company at the low-tension side of said substation. Company shall make records from said meter available to Cooperative and/or TVA upon request. Cooperative hereby grants Company such rights in and on Cooperative's property as may be necessary for the use, installation, operation, and maintenance of the aforementioned metering equipment.

4. (a) Section 1 of Article III of an agreement dated as of March 22, 1951, between TVA and Company, which agreement is designated in TVA's files as Contract TV-11505A, is amended, effective with the date of initial delivery of power by Company to TVA at Tazewell Substation, by adding to the tabulation there set out, the following:

Delivery Point	Maximum Demand	Present Delivery Voltage	Future Delivery Voltage
High side of Powell Valley Electric Cooperative's Tazewell Substation...	1,500 kva	33,000	66,000

[fol. 1248] (b) Deliveries of power and energy to TVA at the point established in Section 4(a) hereof shall be made in accordance with the provisions of Articles III and V of said Contract TV-11505A.

5. (a) Cooperative shall permit TVA to make such tests of Cooperative's meter at Tazewell Substation as is deemed necessary or desirable in TVA's judgment. In the event such tests prove the meter is inaccurate by more than 2% fast or slow, TVA shall have the right to make such adjustments as may be necessary to bring the accuracy of the meter within the above limits. If such adjustments fail to improve the accuracy of the meter to such extent, Cooperative shall replace said meter. All readings and charts from said meter shall be TVA's property and TVA shall read said meter each month and shall furnish charts for said meter as required.

(b) Power and energy supplied by TVA to Cooperative through the system of Company as provided herein shall be delivered, taken and paid for in accordance with and subject to all the terms and provisions of the Power Contract except as expressly provided herein. For purposes of billing under the Power Contract the power and energy so delivered to Cooperative shall be the amounts registered on Cooperative's meter at Tazewell Substation plus the portion of transformer losses caused by Cooperative's load at said substation and these amounts shall be added on a simultaneous basis to the measurements of power and energy de-

livered to Cooperative by TVA at the Fitts Gap Substation.

[fol. 1249] 6. This agreement shall be effective as of the date first above written and shall remain in effect until the expiration of said Contract TV-11505A.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective officers thereunto duly authorized, as of the day and year first above written.

Attest:

O. C. Albert, ——, ——.

Powell Valley Electric Cooperative.
By C. M. Collins, President.

Attest:

G. M. Kilgus, Assistant Secretary.

Kentucky Utilities Company.
By M. Brown,
Vice President.

Attest:

Leona LeRoy, Assistant Secretary.

Tennessee Valley Authority.
By John Oliver,
General Manager.

[fol. 1250] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 101

TVA ANNUAL REPORT 1946

Power Contract Between Tennessee Valley Authority and Powell Valley Electric Cooperative

This agreement, made and entered into as of the 8th day of September, 1945, between Tennessee Valley Authority (herein called "Authority"), a corporation created and existing under and by virtue of the Tennessee Valley Authority Act of 1933 as amended, its successors and assigns, and Powell Valley Electric Cooperative (herein called "Cooperative"), a corporation duly created, organized, and existing under and by virtue of the laws of the Commonwealth of Virginia, its successors and assigns; witnesseth:

Whereas, Authority, by section 10 of the Tennessee Valley Authority Act of 1933 as amended, is authorized to sell the surplus power generated by it and not used in its operations, and is directed to give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers not organized or doing business for profit; and

Whereas, by section 11 of said Act it is provided that the sale of power by Authority shall be primarily for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available; and

Whereas, Cooperative has been organized under the laws of the Commonwealth of Virginia for the purpose of providing electric service to its members at the lowest cost consistent with sound business practice and without profit; and

Whereas, Cooperative desires to purchase power from Authority at wholesale for the operation of its electric system and Authority is willing to supply such power under the terms and conditions hereinafter stated; and

Whereas, all acts, things, and conditions necessary under law and Cooperative's articles of incorporation and bylaws to make this agreement the valid and binding obligation of

the parties hereto have been duly done, performed, and complied with;

Now, therefore, for and in consideration of the mutual covenants herein contained and subject to all of the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto mutually covenant and agree as follows:

[fol. 1251] 1. *Term of contract.*—This contract shall become effective as of the date first above written, except that the provisions hereof with respect to the rendition of electric service and payment therefor at wholesale and retail and all computations of service and payment periods shall begin upon and as of the date when Cooperative has completed the transmission and substation facilities to be constructed pursuant to section 2 hereof and notifies Authority that it is ready to accept electric-service hereunder, such date being hereafter referred to as "date of initial delivery." This contract shall continue in effect for a term of twenty (20) years from the date of initial delivery; provided, however, that this contract shall automatically terminate if the date of initial delivery hereunder has not occurred prior to the 1 day of January, 1947.

2. *Construction of facilities.*—Cooperative shall, at its own expense, furnish all materials and labor for the construction of and construct a 66-kv transmission line from Authority's 66-kv Rogersville Substation to Fits Gap, and a 3,000 kva. 66/12-kv substation, including four 12-kv oil circuit breakers, together with appurtenant equipment. The said line and substation shall be constructed in accordance with plans and specifications which shall be approved in advance by Authority, and the facilities constructed shall be inspected and accepted by Authority before they are connected to Authority's system. The Authority shall at Cooperative's request, perform certain of the engineering associated with the construction of the said line and substation, and Cooperative shall reimburse Authority for its actual expenses of engineering and inspection, plus overheads in the amount of twelve and one-half (12½%) percent. The facilities to be constructed hereunder shall be and remain the property of Cooperative after the completion of the construction thereof until such time as Authority purchases them as hereinafter in this section provided. The

said facilities shall be operated and maintained in accordance with a supplemental agreement to be entered into by the parties until such time as Authority purchases them.

The Authority shall have the right at any time to purchase the said facilities at cost of construction, not to exceed $240,000, less depreciation at the rate of three (3%) percent per annum. Authority shall be obligated to purchase such facilities on the above basis when, and if, Cooperative's average monthly maximum demand for billing purposes hereunder equals or exceeds twenty-five hundred kilowatts (2,500 kw) during a period of six (6) consecutive months.

3. *Power supply.*—Authority will, from the date of initial delivery hereunder and for the term of this contract, supply all of Cooperative's power requirements for corporate uses and for resale up to the maximum demand specified in section 4 hereof.

Cooperative shall in no event purchase power from any other source without the consent of Authority, unless Authority has refused to supply Cooperative such additional quantities of power as may have been applied for as provided herein, and then only to the extent of its requirements in excess of the power available from Authority. Should Cooperative during the period of this contract, desire to increase its purchases of power in excess of the maximum provided herein, Cooperative may apply to Authority for additional quantities of power. Such application shall be in writing and shall be supported by proof of probable need for such additional power. Authority shall, within a reasonable time (which shall be determined in each instance by Authority but which in no case shall exceed twenty-four (24) months) and with due diligence, make arrangements to deliver such additional power, but only to the extent that Authority, in its judgment, has power available from its own generating plants after all requirements of Authority, the United States of America, and prior contractual commitments have been met. In the event reservation or substantial alteration of existing generating or transmission facilities or installation of additional generating or transmission facilities is necessary to enable Authority to fulfill Cooperative's request for increased quantities of power, Cooperative agrees to give Authority such assurances respecting increased use of power as in Authority's judgment may be

necessary to justify such reservation, alteration, or installation of facilities.

4. *Point of delivery and metering.*—The power and energy to be supplied hereunder shall be delivered at the delivery point designated below and, under normal operating conditions, shall be within commercial limits of sixty (60) cycles per second and the delivery voltage hereinafter specified for such point of delivery. Such power and energy shall be metered at the metering point specified below and, notwithstanding anything to the contrary appearing in the Schedule of Terms and Conditions attached hereto as a part hereof, [fol. 1252] the measurements of demand, energy, and power factor at such metering point shall be used for billing purposes without adjustment for transmission and transformation losses between the point of delivery and the point of metering.

Delivery point	Normal wholesale delivery voltage	Maximum demand (kva.)	Metering point
Authority's Rogersville 66-kv. substation	66,000	[1]1,500	At low-tension side of proposed substation at Fits Gap.

[1] C. M. C. V. Pres. GRC.

Authority shall be obligated to have installed at such delivery point only such protective equipment as in its opinion is necessary for the protection of its facilities supplying energy to such delivery point, but in no case shall Authority be obligated to furnish more than one such installation for each delivery point. Cooperative agrees to operate its system and to design and construct future extensions so that it will be feasible to provide its entire power requirements from the point of delivery specified herein.

5. *Wholesale rates.*—Attached hereto and hereby made a part hereof is a "Schedule of Rates and Charges" wherein Cooperative is referred to as "Distributor." Cooperative agrees to pay for the energy supplied by Authority at the rates fixed in Wholesale Power Rate Schedule A. All payments shall be made to Authority at its principal offices at Wilson Dam, Alabama, or at such other place as Authority may from time to time designate.

6. *Resale rates.*—In order to assure a wide and ample

distribution of electricity in the area served by Cooperative, Authority and Cooperative agree as follows:

(1) Cooperative agrees that the surplus power purchased hereunder shall be sold and distributed to the ultimate consumer without discrimination between consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any customer.

(2) Cooperative agrees to charge consumers the rates set forth for the several classes thereof, and in Schedules B-1, BG, B-5.1 of the Schedule of Rates and Charges and not to depart therefrom except by agreement of the parties. Additional resale schedules for special classes of consumers or special uses of electricity may be added from time to time by agreement of the parties. The term "Distributor" in said schedule shall be construed to mean Cooperative. If it should appear that Cooperative is unable to maintain and operate its electric system on a self-supporting and financially sound basis, then Cooperative and Authority shall agree upon, and Cooperative shall put into effect, such changes in rates as will provide for the increased revenues necessary to place the system upon a self-supporting and financially sound basis.

7. *Amortization charges.*—Cooperative shall add to all billings for electric energy under Rate Schedules B-1 and BG an amortization charge of One Cent (1¢) per kilowatt-hour for the first one hundred kilowatt-hours (100 kwh) used per month, said charge to be not less than Twenty-five Cents ($0.25) nor more than One Dollar ($1) per billing per month. The proceeds of such charges shall be segregated from all other revenues and shall be deemed and considered trust funds applicable exclusively to the payment of the interest on or the principal of all notes, bonds, or other evidences of long-term indebtedness issued or assumed by Cooperative in the acquisition, improvement, or extension of its electric distribution system (hereinafter called the "System Indebtedness"). Such charge shall be continued until all System Indebtedness shall be fully paid and discharged, unless consent to an earlier removal of such charge be obtained from Authority and the holder or holders of a majority of then-outstanding System Indebtedness, including the consent of each agency of the Federal Government which may at such time be a holder of System Indebtedness.

8. *Disposition of cooperative's revenues.*—Cooperative, for the purpose of providing reasonable rates for electric service pursuant to this contract and to law, agrees to dispose of its gross revenues (not including the proceeds of amortization charges, which shall be disposed of as hereinbefore provided) in the following manner:

(a) Revenues shall first be used for the payment of all current operating expenses, including salaries, wages, cost of materials and supplies, taxes, power at wholesale, and insurance.

[fol. 1253] (b) From remaining revenues Cooperative shall next currently provide for the payment, at maturity, of interest on all System Indebtedness, and for amortization charges and/or sinking fund payments thereon.

(c) Thereafter, revenues shall be used currently to set up reasonable reserve for replacements, new construction, and for contingencies, and to provide a reasonable amount of cash working capital.

(d) All remaining revenues shall be considered surplus revenues and shall serve as a basis for the reduction or elimination of amortization charges and surcharges to consumers, and thereafter for the reduction of rates; provided, however, that Cooperative may, subject to the written consent of Authority, devote part or all of such surplus revenues to the purchase or retirement of System Indebtedness prior to maturity. Surplus revenues shall be computed as of June 30 of each year.

9. *Terms and conditions.*—Attached hereto and hereby made a part hereof is a "Schedule of Terms and Conditions." The provisions of this schedule may from time to time be changed or supplemented by written agreement of Cooperative and Authority. It is understood and agreed that the several provisions of said schedule, with such changes as may from time to time be adopted pursuant thereto, as well as the several provisions of this contract and of the Schedule of Rates and Charges, are of the essence of this contract.

10. *Rules and regulations.*—Attached hereto and hereby made a part hereof is a "Schedule of Rules and Regulations." Cooperative hereby adopts said schedule as the rules and regulations of Cooperative. The provisions of said schedule may be amended by Cooperative at any time upon ten (10)

days' written notice to Authority setting forth the nature of and the reason for the proposed change. No change shall be made in said schedule, however, which is inconsistent with or in violation of any of the provisions of this contract. In said schedule the term "Distributor" shall be construed to mean Cooperative.

11. *Rendition of advisory services by Authority.*—Authority agrees to render advisory services to Cooperative in problems of personnel and administration and to secure the attendance of its officers at meetings of the Cooperative or its Board of Directors, so far as may be practicable and convenient. Cooperative agrees to pay the reasonable value of such advisory services as are rendered by Authority at the written request of Cooperative.

12. *Maintenance of service.*—Cooperative agrees to maintain and operate its system in such manner, including the maintenance of personnel and equipment at appropriate points throughout its system, as to provide for the system's efficient operation and for good and reliable service to consumers. Cooperative agrees that it will not employ or retain in its employ any person whom Authority or the Administrator of Rural Electrification Administration reasonably consider not qualified for his position or whose services Authority or said Administrator reasonably deem to be unnecessary.

13. *Use of lines for transmission purposes.*—Authority is hereby granted the right, privilege, and authority to use all electric lines of Cooperative, to the extent of their capacity in excess of the requirements of Cooperative, for the purpose of transmitting electric energy to other municipalities, public agencies, or cooperatives which may desire to purchase power at wholesale from Authority. Authority shall be obligated to pay Cooperative the additional cost, including additional fixed charges and operating and maintenance costs imposed on Cooperative by permitting such use of its facilities by Authority, and to indemnify and save Cooperative harmless from any loss, damage, injury, or casualty to persons or property caused by Authority's exercise of such permitted use.

14. *Reports to Authority.*—Cooperative agrees that not later than the first day of September of each year it will render to Authority a complete report, in such form as

Authority may prescribe, of the results of its operations for the preceding year ending June 30, the condition of its property, and such other information as Authority may reasonably request. Cooperative agrees promptly to render such additional reports and information to Authority as Authority may from time to time reasonably request.

15. *Waiver of defaults.*—Any waiver at any time by either party hereto of its rights with respect to any default of the other party hereto and/or with respect to any other matter arising in connection with this contract shall not be considered a waiver with respect to any subsequent default or matter.

16. *Contract not transferable.*—Neither this contract nor any interest therein shall be transferable or assignable by Cooperative to any party other than the United States of America or any agency thereof without the consent in writing of Authority.

[fol. 1254] In witness whereof, the parties hereto have caused this instrument to be executed by their duly authorized officers as of the day and year first above written.

[SEAL]

TENNESSEE VALLEY AUTHORITY,
By (s) GORDON R. CLAPP, General Manager.
C. A. R., Legal Department.

Attest:

(s) LEONA LEROY, Assistant Secretary.

POWELL VALLEY ELECTRIC COOPERATIVE,
By (s) C. M. COLLINS, Vice President.

Attest:

(s) O. C. ALBERT, Secretary.

Approved by TVA Board of Directors, September 12, 1945.

L. L., Assistant Secretary.

Schedule of Rates and Charges

Wholesale Power Rate—Schedule A

Availability

Primary power purchased for resale available to states, counties, municipalities, and cooperative organizations of citizens or farmers.

Rate

Demand charge.—Ninety cents per kilowatt of demand per month.

Energy charge.—First 100,000 kilowatt-hours consumed per month at 4 mills per kilowatt-hour, next 200,000 kilowatt-hours consumed per month at 3 mills per kilowatt-hour, next 700,000 kilowatt-hours consumed per month at 2.5 mills per kilowatt-hour, excess over 1,000,000 kilowatt-hours consumed per month at 2 mills per kilowatt-hour.

Charge for energy in excess of 360 times the total demand as hereinafter defined shall be subject to a reduction of 0.5 mill per kilowatt-hour from the otherwise applicable rate.

Determination of Demand

The demand for any month for which determination is made shall be defined as the highest average load measured in kilowatts during any 60 consecutive minute period of the month, but, at the Authority's option, when the power factor is found to be lower than 85 percent, the demand shall be defined as 85 percent of the highest average kilovolt-amperes measured during any 60 consecutive minute period of the month.

Minimum Monthly Bill

Ninety cents per kilowatt of demand, but in no case shall the minimum bill be less than the charge for 60 percent of the highest demand occurring during any month within the previous consecutive twelve-month period.

Allowance for Sales to Residential Customers

Authority will adjust bill so that the energy charge shall be 2 mills per kilowatt-hour for at least so much energy as may be sold by Distributor under the residential resale schedule at 4 mills per kilowatt-hour.

Single-Point Delivery

The above rates are based upon the supply of service through a single delivery and metering point, and at a single voltage. Separate supply for the same customer at other points of delivery, or at different voltage, shall be separately metered and billed.

Standard Residential Rate—Schedule B-1

Availability

Available for domestic use to all residential customers served from local alternating current distribution systems. Service under the Standard Residential Rate shall apply only to electric service in a single private dwelling and its appurtenances, the major use of which is for lighting and [fol. 1255] household appliances, for the personal comfort and convenience of those residing therein. Private dwellings in which space is occasionally used for the conduct of business by a person residing therein will be served under the Standard Residential Rate. Where a portion of a dwelling is used regularly for the conduct of business, the electricity consumed in that portion so used will be separately metered and billed under the appropriate Basic Lighting and Power Rate. If separate circuits are not provided by the customer, the entire premises shall be classified as non-residential and billed accordingly. The Standard Residential Rate shall not apply to service to institutions such as clubs, fraternities, orphanages or homes; recognized rooming or boarding houses; the space in an apartment or other residential building primarily devoted to use as an office or studio for professional or other gainful purposes.

Character of Service

Alternating-current service at approximately 60 cycles, 120 or 240 volts, either single-phase, two-wire or three-wire; or, three-phase, three-wire or four-wire, as may be required by Distributor.

Rate

First 50 kilowatt-hours consumed per month at 3 cents per kilowatt-hour, next 150 kilowatt-hours consumed per month at 2 cents per kilowatt-hour, next 200 kilowatt-hours consumed per month at 1 cent per kilowatt-hour, next 1,000 kilowatt-hours consumed per month at 0.4 cent per kilowatt-hour, excess over 1,400 kilowatt-hours consumed per month at 0.75 cent per kilowatt-hour.

Minimum Monthly Bill

$0.75 per meter.

Payment

Above rates are net, the gross rates being 10 percent higher. In the event that the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Single-Point Delivery

The above rates are based upon the supply of service to the entire premises through a single delivery and metering point, and at a single voltage. Separate supply for the same customer at other points of consumption, or at a different voltage, shall be separately metered and billed.

Service under this classification is subject to Rules and Regulations of Distributor.

General Lighting and Power Rate, Schedule BG

Availability

Available to all customers except to those to whom service is available under the Residential or Street Lighting Schedules.

Character of Service

Alternating current, single or three-phase, 60 cycles. Voltage supplied will be at the discretion of the Distributor and will be determined by the voltage available from distribution lines in the vicinity and/or other conditions.

Rate

If the customer's demand for the month does not exceed 10 kilowatts: First 150 kilowatt-hours per month at 3.0 cents per kilowatt-hour; next 350 kilowatt-hours per month at 2.0 cents per kilowatt-hour; next 1,250 kilowatt-hours per month at 1.0 cent per kilowatt-hour; additional energy at 0.8 cent per kilowatt-hour.

If the customer's demand for the month is over 10 but not over 40 kilowatts: *Demand charge.*—First 10 kilowatts of demand per month, no demand charge; excess over 10 kilowatts of demand per month, at $1.00 per kilowatt.

Energy charge.—First 150 kilowatt-hours per month at 3.0 cents per kilowatt-hour; next 350 kilowatt-hours per month at 2.0 cents per kilowatt-hour; next 1,250 kilowatt-hours per month at 1.0 cent per kilowatt-hour; next 13,250 kilowatt-hours per month at 0.8 cent per kilowatt-hour; additional energy at 0.55 cent per kilowatt-hour.

[fol. 1256] If the customer's demand for the month is over 40 kilowatts: *Demand charge.*—First 1,000 kilowatts of demand per month at $1.00 per kilowatt; excess over 1,000 kilowatts of demand per month at 0.90 per kilowatt.

Energy charge (subject to a reduction of 0.05 cent per kilowatt-hour in excess of 360 kilowatt-hours per kilowatt of the demand).—First 15,000 kilowatt-hours per month at 0.8 cent per kilowatt-hour; next 25,000 kilowatt-hours per month at 0.6 cent per kilowatt-hour; next 60,000 kilowatt-hours per month at 0.4 cent per kilowatt-hour; next 400,000 kilowatt-hours per month at 0.3 cent per kilowatt-hour; additional energy at 0.25 cent per kilowatt-hour.

Minimum Monthly Bill

The minimum monthly bill shall be $1.00, plus $0.50 per kilowatt for the excess over 10 kilowatts of the highest demand during the 12 months ending with the current month.

Seasonal Service

Customers who contract for service on a seasonal basis shall pay the above rates plus 10 percent. For such customers the "Minimum Monthly Bill" provided above shall not apply. Instead, such customers shall pay a minimum

monthly bill of $5.00 so long as service is cut in, provided that such customers shall pay a minimum annual bill of $6.00 per kilowatt of the maximum demand established, and shall pay in addition the actual cost of cut-ins and cut-outs in excess of one of each per year.

Surcharge

Bills, including minimum bills and bills for seasonal service, are subject to Distributor's surcharge. The surcharge will be based on a straight percentage of the bill.

Determination of Demand

The Distributor will measure the demands of all customers having a connected load in excess of 10 kilowatts. Demand measurement shall be made by suitable instruments at the point of delivery. The demand for any month shall be defined at the highest average load measured in kilowatts during any 30 consecutive-minute period of the month, but at Distributor's option, when the power factor is found to be lower than 85 percent, the demand shall be defined as 85 percent of the highest average kilovolt-amperes measured during any 30 consecutive-minute period of the month.

Contract Requirement

Customers whose demand exceeds 20 kilowatts will be required to execute contracts for a minimum term of one year which may provide for minimum charges in excess of those described herein.

Payment

Above rates are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Single-Point Delivery

The above rates are based upon the supply of service through a single delivery and metering point, and at a single voltage. Separate supply for the same customer at other points of consumption, or at different voltage, shall be separately metered and billed.

Service under this classification is subject to Rules and Regulations of Distributor.

STANDARD STREET LIGHTING RATE—SCHEDULE B-5.1

Availability

Available for street-lighting systems, including street lighting, signal systems, and roadway and park lighting, for a term of not less than one year.

Character of Service

Alternating-current service, either series or multiple system or in combination, at option of Distributor.

[fol. 1257]

Rate

The rate for this service consists of two parts, as follows:

I. *Investment charge.*—The annual investment charge (for the cost of operation, maintenance, taxes, and depreciation, and for return on investment) shall be 12 percent of the investment in the street-lighting system, determined as set forth below. Such charge shall be adjusted under the circumstances set forth below. This charge will be recomputed on July 1 of each year and one-twelfth of the total annual charge so computed will be billed customer monthly.

II. *Energy charge.*—First 250 kilowatt-hours consumed per month at 3 cents per kilowatt-hour, next 750 kilowatt-hours consumed per month at 2 cents per kilowatt-hour, next 1,000 kilowatt-hours consumed per month at 1 cent per kilowatt-hour, excess over 2,000 kilowatt-hours consumed per month at 0.8 cent per kilowatt-hour.

Method of Determining Distributor's Investment

The investment in property and equipment used as a basis for the investment charge contained in this schedule shall consist of the cost of such property and equipment, including the full amount show in the plant account entitled "Street Lighting and Signal Systems." If any part of the street-lighting system has not been built at the expenes of Dis-

tributor, a deduction shall be made from the annual investment charge in the amount of 6 percent of the investment in such part.

If the cost of any part of the street-lighting system operated by the electricity department of Distributor is carried on the books of other municipalities or agencies or other municipal departments of Distributor, retirements and additions to such property will be made by the electricity department and charged to the department upon the books of which the cost of the property is reflected, or to the other agency owning such property. The investment charge applicable to this portion of the system will be 2 percent per year.

Lamp Renewals

Distributor shall keep a record of the number and type of lamp replacement and customer shall be billed monthly for the replacements during the month at actual cost to Distributor, including appropriate overheads.

Relocation of Lamps

Distributor shall, at the request of customer, relocate or change existing equipment. Customer shall reimburse Distributor for such changes at actual cost, including appropriate overheads.

Metering

All energy consumed under this schedule shall be metered excepting installations where, in the opinion of Distributor, metering would be impracticable.

When the consumption is metered, the meters shall be installed in or connected to the lighting circuit and the billing shall include the energy delivered to and consumed in all circuits and equipment used exclusively for street lighting purposes. If more than one meter is used, the readings shall be consolidated for billing purposes.

When the energy is not metered, and also when a meter reading is found to be in error, the consumption for billing purposes shall be computed from the rated capacity of the lamps, plus 5 percent for losses, multiplied by the number of hours of use.

Payment

The rates included herein are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Service under this classification is subject to Rules and Regulations of Distributor.

SCHEDULE OF TERMS AND CONDITIONS OF CONTRACT

1. *Measurement of demand, energy, and power factor.*—Demand and energy measurements shall be made by suitable instruments at the point or points of delivery or may, at the option of Authority, be made at some other point or points where housing facilities are available or may be made avail-[fol. 1258] able and/or operation simplified; provided, however, that in the event the metering is effected at some other location than at point of delivery, suitable correction shall be made by Authority of the amounts determined at such location so that the adjusted amounts will so far as possible reflect the exact quantities delivered at the actual point or points of delivery.

Authority will, at its own expense, install and maintain the necessary meters for measuring the maximum demand and the amount of energy furnished Cooperative; provided, that should these meters fail or be found inaccurate the maximum demand and amount of energy delivered will be estimated by Authority from the best information available. Authority may also, at its option, from time to time measure power factor. Cooperative shall permit the use of its housing facilities, ducts, and supports for Authority's metering equipment.

Cooperative shall have the right to install, equip, and maintain at its own expense suitable instruments for measuring demand, power factor, and energy adjacent to Authority's measuring devices for purposes of a check on said devices, and Authority agrees that it will so far as practicable provide suitable facilities for the installation of such metering devices within its substation enclosures.

2. *Meter tests.*—Authority will, at its own expense and

in the presence of representatives of Cooperative, make periodical tests and inspections of its meters in order to maintain a high standard of accuracy. Authority will make additional tests or inspections of its meters at the request of Cooperative and in the presence of representatives of Cooperative. If such additional tests show that the meter is accurate within 2%, slow or fast, no adjustment will be made in Cooperative's bill, and the testing charge will be paid by Cooperative. In case the test shows the meter to be in excess of 2%, fast or slow, an adjustment shall be made in Cooperative's bill over a period of not over thirty (30) days prior to date of such test, and cost of making test shall be borne by Authority.

3. *Cooperative's lines and equipment—Ownership.*—All lines and substations from point of Delivery (as defined in the contract of which these terms and conditions are a part), and all electrical equipment, except the metering equipment of Authority, located on Cooperative's side of such Point of Delivery shall be furnished and maintained by Cooperative.

4. *Inspections.*—Authority shall have the right, but shall not be obligated, to inspect any installation before electricity is introduced or at any later time, and Authority reserves the right to reject any wiring or equipment not in accordance with Authority's reasonable standards; but such inspection, or failure to inspect or to reject shall not render Authority liable or responsible for any loss or damage resulting from defects in the installation of any electrical equipment, from violation of the contract of which these terms and conditions are a part, or from accidents which may occur upon Cooperative's premises.

5. *Cooperative's responsibility for Authority's property.*—All meters, service connections, and other equipment furnished by Authority shall be and remain the property of Authority. Cooperative shall exercise proper care to protect the property of Authority on Cooperative's premises, and in the event of loss or damage to Authority's property, arising from neglect of Cooperative to care for same, the cost of necessary repairs or replacement shall be paid by Cooperative.

6. *Right of access.*—Authority's identified employees shall have access to Cooperative's premises at all reasonable times for the purpose of reading meters, and for testing, repairing,

renewing, or exchanging any or all equipment belonging to Authority.

7. *Additional load.*—The service connection, transformers, meters, and equipment supplied by Authority for Cooperative have definite capacity and no addition to the equipment or load connected thereto, in excess of such capacity, shall be made except after reasonable notice to Authority. Failure to give such notice of additions or changes in load shall render Cooperative liable for any damage to Authority's lines or equipment caused by the additional or changed installation.

8. *Cooperative's lines and equipment—Standards.*—All lines and equipment of Cooperative must conform to accepted modern practice, as exemplified by the requirements of the National Electrical Safety Code and the National Electric Code.

9. *Accounting and handling of funds.*—Cooperative agrees:

(a) To administer its electric system as a separate department, to establish and maintain a separate fund for its revenues from electrical operations, and not to mingle funds or accounts with those of any other of its operations.

(b) To keep the general books of accounts of its electric system according to a system of accounts to be prescribed by Authority after conference with Cooperative, which system of accounts will so far as possible be uniform with other systems prescribed and applied in other cooperative associa- [fol. 1259] tions purchasing electrical energy from Authority. Authority will render such advisory accounting service in the setting up and administering of such accounts as Authority may deem reasonable.

(c) To furnish promptly to Authority such operating and financial statements relating to electric system operations as may reasonably be requested by Authority. In the event of failure to furnish promptly such operating and financial statements, Authority, following written notification to Cooperative of intention so to do, may with its own staff perform all work necessary to collect such data as is reasonably desired. Cooperative agrees to reimburse Authority its actual expenses incurred, including salaries, subsistence, and traveling expenses of personnel so engaged.

(d) To allow the duly authorized agents of Authority to

have free access at all reasonable times to all books and records relating to electric system operations.

10. *Billing.*—Payment for energy used in any monthly period shall be due fifteen (15) days after Authority's meter reading date or five (5) days after receipt of bill from Authority, whichever is later. Upon failure of Cooperative to pay for the energy used in any monthly period within sixty (60) days after due date, Authority shall have the right, upon reasonable notice, to discontinue the supply of energy and refuse to resume delivery so long as any part thereof remains unpaid. Discontinuance of supply under this section will not relieve Cooperative of its liability for the agreed minimum monthly payment during the time the supply of energy is so discontinued. To any amount remaining unpaid fifteen (15) days after the due date, there shall be added a penalty of one (1) percent and an additional one (1) percent shall be added for each succeeding thirty (30) day period until the amount is paid in full. All payments shall be made to the Authority at its offices at Wilson Dam, Alabama, or at such other place as Authority may from time to time designate.

11. *Interrupting of service.*—Authority will furnish energy as agreed upon continuously so far as reasonable diligence will permit; but Authority, its officers, agents, or employees shall not be liable for damages when, for any reason, suspensions of the operation of the generation and transmission system serving Cooperative or any part thereof interfere with the delivery of electric energy to Cooperative, nor shall such an interruption constitute a breach of this contract on the part of Authority, but Authority shall make appropriate adjustment of the demand charge in the event of an interruption.

12. *Lower rates to other wholesale customers.*—If at any time during the term of this agreement Authority should supply electricity to any municipality, municipal division or department, or cooperative association at a lower rate schedule than that applicable to Cooperative, and such lower rate schedule shall not be justified in the judgment of Authority by different conditions of service, making the cost to such other municipality, division, department, or cooperative relatively less than to Cooperative, such lower rate shall be made available to Cooperative so long as such lower rate

schedule shall be given to such other customer while this contract is in force.

13. *Developmental surcharge.*—In order to maintain Cooperative's revenues in the developmental period during which Cooperative is building up its load, Cooperative may also impose a surcharge upon those classes of consumers subject to a surcharge under the provisions of the Schedule of Rates and Charges. Cooperative may initially determine and may from time to time vary such surcharge, with the understanding, however, that all surplus revenues (as defined in the contract of which Schedule is a part) shall serve as a basis for the reduction or elimination of such surcharge. The surcharge shall be based on a straight percentage of bills and shall apply uniformly to all classes as to which surcharges are authorized.

14. *Adjustment of rates.*—In the event a major increase or decrease in general price and wage levels of such a substantial character as materially and substantially to change the cost basis upon which the wholesale rates fixed by this contract are predicated, the parties hereto agree to an adjustment of such rates. Should the cost-of-living index for the United States as a whole compiled by the Department of Labor or the United States show a decrease for a period of six consecutive calendar months, or for any month in said period if index figures are not reported for each month thereof, of thirty (30) percent or more under the index figures for the index period including the month in which this contract is signed, or for any month in said period if index figures are not reported for each month thereof, Cooperative and Authority shall agree to such a reduction in rates as will conform to the decreased cost of electricity supply, and should such index figures show a thirty (30) percent or more increase for the same period or month, as the case may be, Authority and Cooperative shall agree to such an increase in rates as will conform to the increased costs of [fol. 1260] electricity supply. Cooperative and Authority agree, promptly upon receipt of a request by either, to confer with each other on the changes in rates necessary to conform to changes in the cost of electricity supply and to endeavor to agree upon new rates which shall so conform. The new rates shall be substituted for the wholesale rates set forth in the contract of which this schedule is a part.

15. *Reduction in rates.*—Authority agrees to reduce the wholesale rates herein fixed whenever, in the opinion of Authority, reductions in the cost of generating and transmitting energy make feasible such reductions in rates, the intention of the parties being that Cooperative shall participate in the benefits of reductions in the cost of generation and transmission.

16. *Voltage fluctuations caused by Cooperative.*—Electric service must not be used in such a manner as to cause unusual fluctuations or disturbances to Authority's system. Authority may require Cooperative at its own expense to install suitable apparatus to reasonably limit such fluctuations.

17. *Balancing of loads.*—Cooperative shall at all times take and use energy in such manner that the load will be balanced between phases to within nominally 10%. In the event of unbalanced polyphase loads, Authority reserves the right to require Cooperative at its own expense to make the necessary changes to correct this condition or to compute the balancing demand on the assumption that the load of each phase is equal to that on the greatest phase.

18. *Notice of trouble.*—Cooperative shall notify Authority immediately should the service be unsatisfactory for any reason or should there be any defects, trouble, or accidents affecting the supply of electricity. Such notices, if verbal, should be confirmed in writing.

19. *Submetering.*—Cooperative shall not sell electricity for submetering or further resale.

20. *Conflict.*—In case of conflict between any express contractual provision or any provision of the Schedule of Rates and Charges and these Terms and Conditions, the Contract or Rate Schedule shall apply.

SCHEDULE OF RULES AND REGULATIONS

1. *Application for service.*—Each prospective Customer desiring electric service may be required to sign Distributor's standard form of application for service or contract before service is supplied by the Distributor.

2. *Deposit.*—A deposit or suitable guaranteee approximately equal to twice the average monthly bill may be required of any Customer before electric service is supplied. Distributor may at its option return deposit to Customer

after one year. Upon termination of service, deposit may be applied by Distributor against unpaid bills of Customer, and if any balance remains after such application is made, said balance shall be refunded to Customer.

3. *Point of delivery.*—The point of delivery is the point, as designated by Distributor, on Customer's premises where current is to be delivered to building or premises. All wiring and equipment beyond this point of delivery shall be maintained by Customer.

4. *Customer's wiring—Standards.*—All wiring of Customer must conform to Distributor's requirements and accepted modern standards, as exemplified by the requirements of the National Electrical Safety Code and the National Electric Code.

5. *Inspections.*—Distributor shall have the right, but shall not be obligated, to inspect any installation before electricity is introduced or at any later time, and reserves the right to reject any wiring or appliances not in accordance with Distributor's standards; but such inspection or failure to inspect or reject shall not render Distributor liable or responsible for any loss or damage resulting from defects in the installation, wiring, or appliances, or from violation of Distributor's rules, or from accidents which may occur upon Customer's premises.

6. *Underground service lines.*—Customers desiring underground service lines from Distributor's overhead system must bear the excess cost incident thereto. Specifications and terms for such construction will be furnished by Distributor on request.

7. *Customer's responsibility for distributor's property.*—All meters, service connections, and other equipment furnished by Distributor shall be, and remain, the property of Distributor. Customer shall provide a space for, and exercise proper care to protect the property of Distributor on its premises; and in the event of loss or damage to Distributor's property, arising from neglect of Customer to care for same, the cost of the necessary repairs or replacements shall be paid by Customer.

[fol. 1261] 8. *Right of access.*—Distributor's identified employees shall have access to Customer's premises at all reasonable times for the purpose of reading meters, testing, repairing, removing, or exchanging any or all equipment belonging to Distributor.

9. *Billing.*—Bills will be rendered monthly and shall be paid within ten (10) days from date of bill at the office of Distributor. Failure to receive bill will not release Customer from payment obligation. Should bills not be paid as above, Distributor may at any time thereafter, upon five (5) days' written notice to Customer, discontinue service. Bills paid on or before the final date of payment shall be payable at the net rates, but thereafter the gross rates shall apply, as provided in the Schedule of Rates and Charges. Should the final date for payment of the bill at the net rates fall on a Sunday or holiday, the business day next following the final date will be held as a day of grace for delivery of payment. Net rate remittances received by mail after the time limit for payment of said net rates will be accepted by Distributor if the incoming envelope bears United States Post Office date stamp of the final date for payment of the net amount or any date prior thereto.

10. *Discontinuance of service by distributor.*—Distributor may refuse to connect or may discontinue service for the violation of any its Rules and Regulations, or for violation of any of the provisions of the Schedule of Rates and Charges, or of the application of Customer or contract with Customer. Distributor may discontinue service to Customer for the theft of current or the appearance of current theft devices on the premises of Customer. The discontinuance of service by Distributor for any causes as stated in this rule does not release Customer from his obligation to Distributor for the payment of minimum bills as specified in application of Customer or contract with Customer.

11. *Reconnection charge.*—Whenever service has been discontinued by Distributor, as provided above, or a trip is made for the purpose of discontinuing service, a charge of not less than One Dollar ($1.00) may be collected by Distributor before service is restored.

12. *Termination of contract by customer.*—Customers who have fulfilled their contract terms and wish to discontinue service must give at least three (3) days' written notice to that effect, unless contract specifies otherwise. Notice to discontinue service prior to expiration of contract term will not relieve Customer from any minimum or guaranteed payment under any contract or rate.

13. *Service charges for temporary service.*—Customers requiring electric service on a temporary basis may be re-

quired by Distributor to pay all costs for connection and disconnection incidental to the supplying and removing of service. This rule applies to circuses, carnivals, fairs, temporary construction, and the like.

14. *Interruption of service.*—Distributor will use reasonable diligence to provide a regular and uninterrupted supply of current, but in case the supply of current should be interrupted or disturbed for any cause, Distributor shall not be liable for damages resulting therefrom.

15. *Voltage fluctuations caused by customer.*—Electric service must be used in such a manner as to cause unusual fluctuations or disturbances to Distributor's system. Distributor may require Customer, at his own expense, to install suitable apparatus which will reasonably limit such fluctuations.

16. *Additional load.*—The service connection, transformers, meters, and equipment supplied by Distributor for each Customer have definite capacity, and no addition to the equipment or load connected thereto will be allowed except by consent of Distributor. Failure to give notice of additions or charges in load, and to obtain Distributor's consent for same, shall render Customer liable for any damage to any of Distributor's lines or equipment caused by the additional or changed installation.

17. *Standby and resale service.*—All purchased electric service (other than emergency or standby service) used on the premises of Customer shall be supplied exclusively by Distributor, and Customer shall not, directly or indirectly, sell, sublet, assign, or otherwise dispose of the electric service or any part thereof.

18. *Notice of trouble.*—Customer shall notify Distributor immediately should the service be unsatisfactory for any reason, or should there be any defects, trouble, or accidents affecting the supply of electricity. Such notices, if verbal, should be confirmed in writing.

19. *Nonstandard service.*—Customer shall pay the cost of any special installation necessary to meet his peculiar requirements for service at other than standard voltages, or standard practice.

20. *Meter tests.*—Distributor will, at its own expense, make periodical tests and inspections of its meters in order for the supply of closer voltage regulation than required by

to maintain a high standard of accuracy. Distributor will [fol. 1262] make additional tests or inspections of its meters at the request of Customer. If tests made at Customer's request show that the meter is accurate within two percent (2%), slow or fast, no adjustment will be made in Customer's bill, and the testing charge of One Dollar ($1.00) per meter will be paid by Customer. In case the test shows meter to be in excess of two percent (2%) fast or slow, an adjustment shall be made in Customer's bill over a period of not over thirty (30) days prior to date of such test, and cost of making test shall be borne by Distributor.

21. *Extensions and additions to street lighting systems.*—Distributor shall, at the request of a customer for street lighting service, provide additions and extensions to the street lighting system, provided that if, in any year ending June 30, Customer requests additions or extensions with a total cost in excess of five percent (5%) of the investment in street lighting property and equipment, Customer may be required to finance such excess cost.

22. *Billing adjusted to standard periods.*—The demand charges and the blocks in the energy charges set forth in the rate schedules are based on billing periods of approximately one month. In the case of the first billing of new accounts (temporary service, cotton gins, and other seasonal customers excepted) and final billings of all accounts (temporary service excepted) where the period covered by the billing involves fractions of a month, the demand charges and the blocks of the energy charge will be adjusted to a basis proportionate with the period of time during which service is extended.

23. *Athletic field lighting.*—Athletic field lighting installations not owned or maintained by Distributor may be served on an off-peak basis in accordance with the provisions of the Standard Street Lighting Rate, Schedule B-5.1. An investment charge of twelve percent (12%) annually based on the cost to Distributor of furnishing and installing the equipment devoted to supplying this service shall be applied as the equivalent of the maintenance charge or investment charge provided for in the rate schedule. Energy will be billed in accordance with the street lighting schedule and each installation will be considered a separate customer for billing purposes. Customer's bills rendered in accordance

with this provision shall be subject to any surcharge and amortization charge applied by Distributor. The off-peak period shall be determined by Distributor, but in no case shall it commence earlier than 7 p.m. Customer may be permitted to use up to ten percent (10%) (not to exceed 10 kilowatts) of the total installed lighting capacity prior to the commencement of the off-peak period, such use to be considered off-peak for billing purposes. In the event Customer fails to restrict service in accordance with these requirements, he shall be billed under the appropriate Large or Small Lighting and Power Rate.

24. *Scope.*—This Schedule of Rules and Regulations is a part of all contracts for receiving electric service from Distributor, and applies to all service received from Distributor, whether the service is based upon contract, agreement, signed application, or otherwise. A copy of this schedule, together with a copy of Distributor's Schedule of Rates and Charges, shall be kept open to inspection at the offices of Distributor.

25. *Revisions.*—These Rules and Regulations may be revised, amended, supplemented, or otherwise changed from time to time, without notice. Such changes, when effective, shall have the same force as the present Rules and Regulations.

26. *Conflict.*—In case of conflict between any provision of any rate schedule and the Schedule of Rules and Regulations, the rate schedule shall apply.

* * * * * * *

[fol. 1263] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 106

Exhibits 2 and 3

The information requested for these two exhibits is combined as follows:

Only a small amount of the power from the Fitts Gap Substation serves any part of Claiborne County. In the interest of simplification I have offset this against an equal amount of power from the Tazewell Substation which goes to Union County. These two amounts have been considered as offsetting and have been disregarded. The remainder of the power from the Tazewell Substation goes approximately 86.5 percent to Claiborne County and 13.5 percent to counties other than Claiborne.

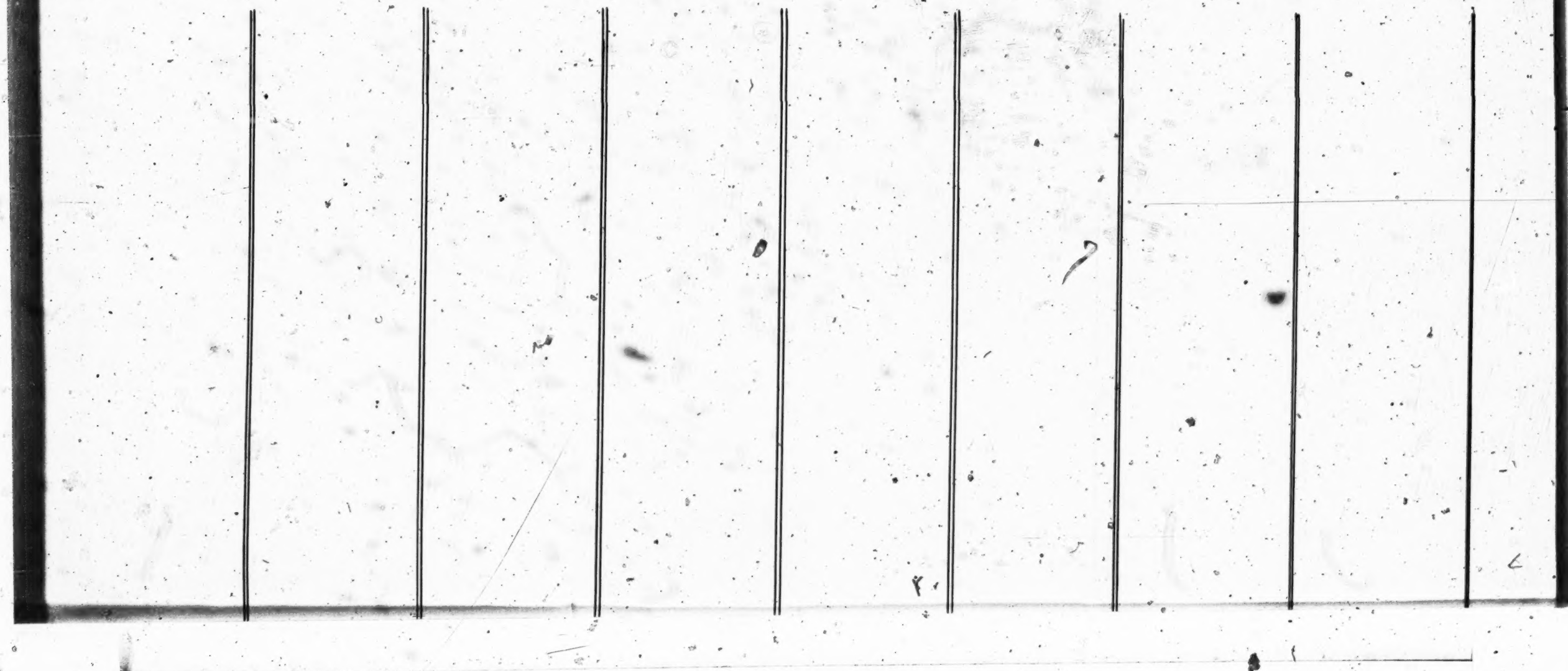
In United States District Court

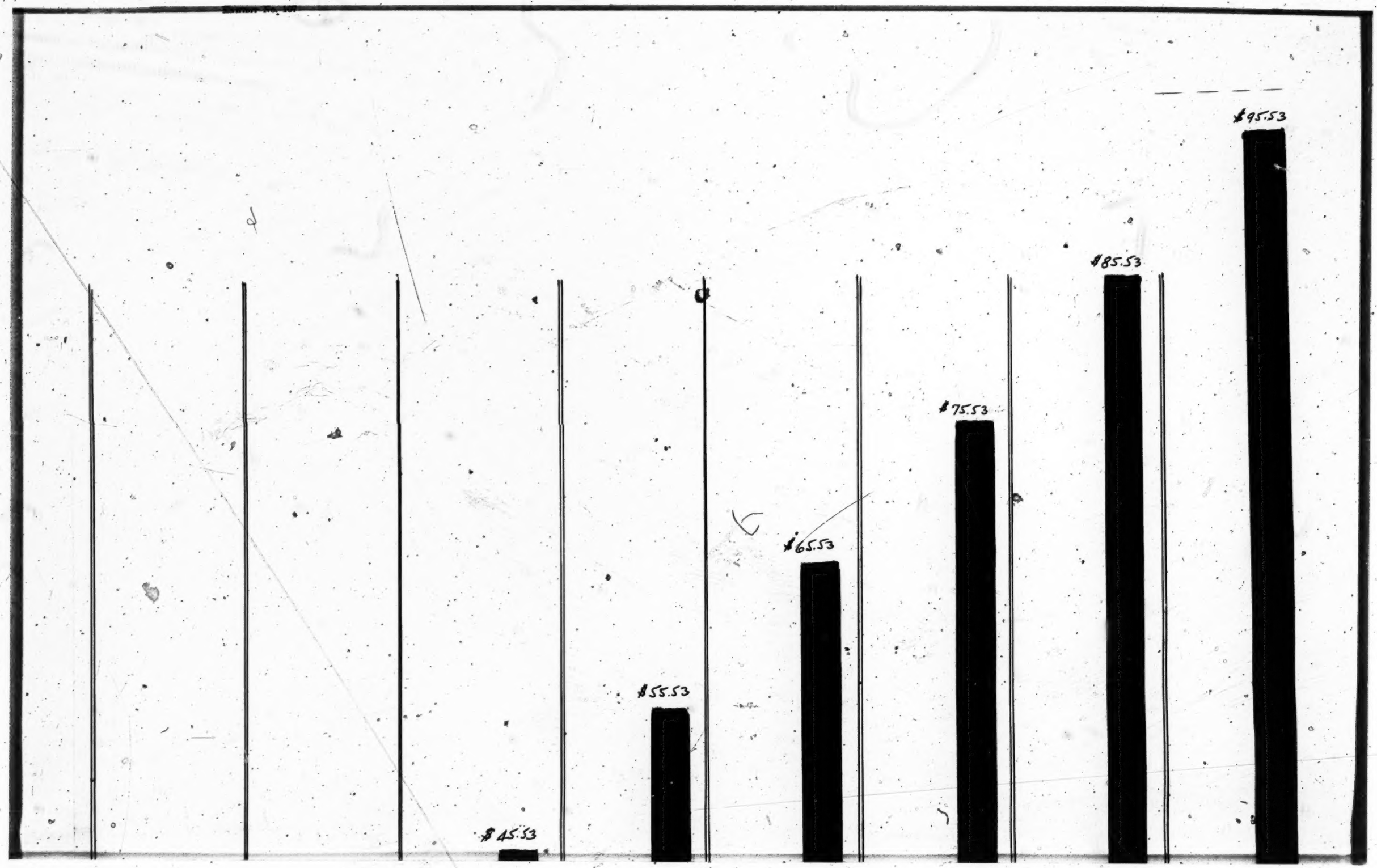
Exhibit No. 107

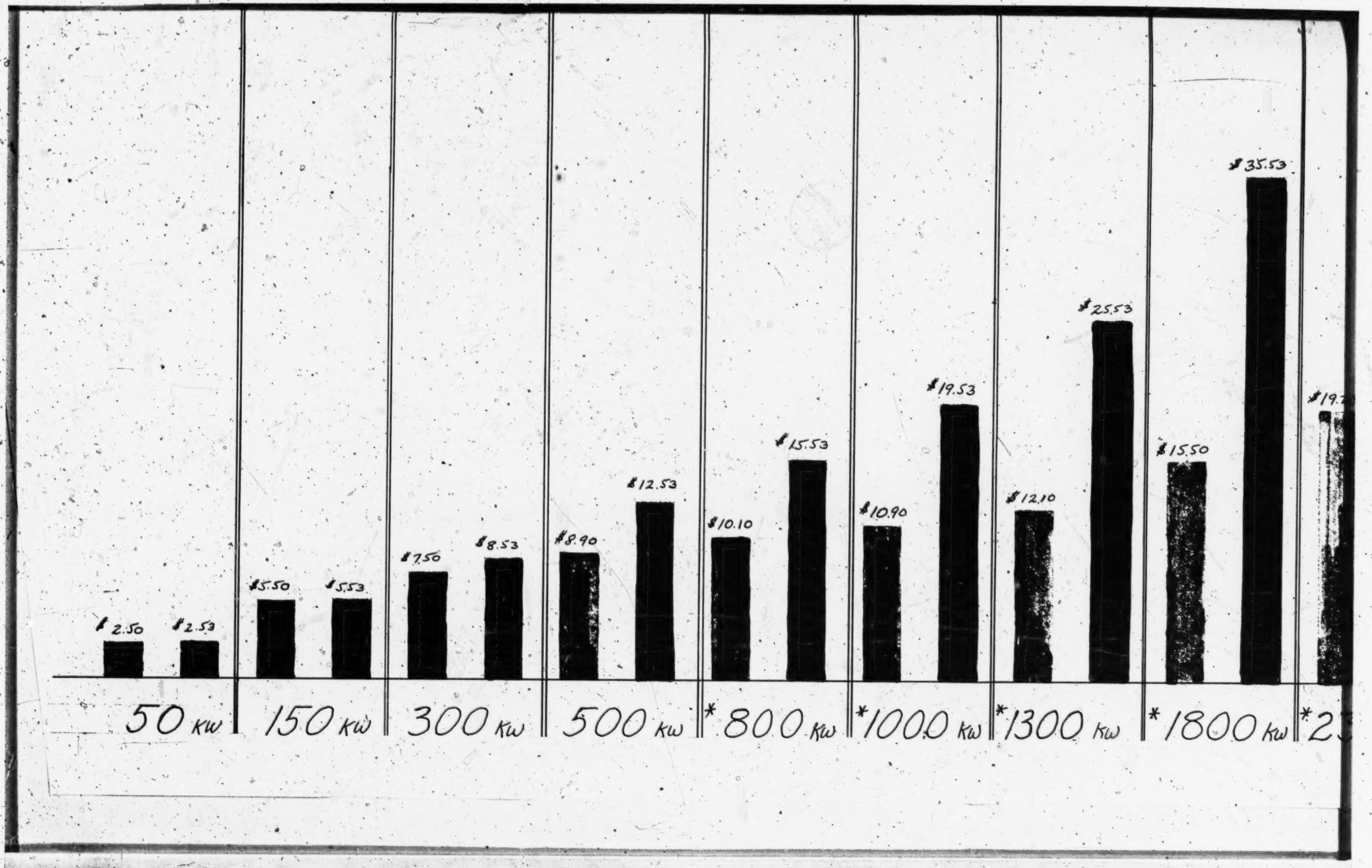
Residential Rate Comparison

Between Kentucky Utilities Company
And Powell Valley Electric Cooperative
As of October, 1963, in Tazewell and New Tazewell

Kentucky Utilities Company—shown on right hand side of each column.
Powell Valley Electric Cooperative—shown on left hand side of each column.
*Includes off peak meter for water heating (300 KW).




$45.53
$55.53
$65.53
$75.53
$85.53
$95.53


$2.50
$2.53
$5.50
$5.53
$7.50
$8.53
$8.90
$12.53
$10.10
$15.53
$10.90
$19.53
$12.10
$25.53
$15.50
$35.53
$19.7
50 KW
150 KW
300 KW
500 KW
*800 KW
*1000 KW
*1300 KW
*1800 KW
*2


$19.53
$25.53
$35.53
$45.53
$19.25
$23.00
$26.75
$30.50
$34.25
$38.00
$12.10
$15.50
0 KW
*1300 KW
*1800 KW
*2300 KW
*2800 KW
*3300 KW
*3800 KW
*4300 KW
*4800 KW

[fol. 1265] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 117

Resolution No. 15

Resolved that the city's action previously taken to employ counsel to assist in acquiring or constructing electrical distribution facilities be ratified and confirmed as limited to Title 6 Chapter 13 of the Tennessee Code Annotated, said employment not to be a charge against the general fund or general revenues of the city nor to necessitate any additional tax requirement, but solely to be limited to and paid from anticipated revenues of the aforesaid facilities as prescribed in said chapter.

Be it further Resolved that since no offer has been received from the Commercial Power Company serving within the city to sell us facilities, the Mayor is hereby empowered forthwith in the name of the city, as prescribed in TCA Title 6 Chapter 13, to contract for the construction of electrical facilities to provide for the needs of the city, its citizens, and the residents of such fringe area as he deems appropriate.

This Resolution voted by Council in a special session, the 21 day of October 1963.

E. J. Hardin, III, Mayor.

Attest:

Douglas Overton, Recorder.

I certify that the above Resolution is an exact copy of Resolution No. 15 and is on file in the Recorder's office in Tazewell, Tennessee.

Douglas Overton, Recorder.

[fol. 1266] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 1 to deposition of C. Wilson House

Telephone conversation with Ralph Miner on Oct. 11, 1962

I advised Ralph Miner that TVA did not feel we should give any recommendation on whether or not the coop. should give notice of cancellation of letter agreement (dated Jan. 8, 1958) with KU. TVA feels this is a matter which the coop's manager, attorney and board should decide upon.

C. Wilson House.

[fol. 1267] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 2 to deposition of C. Wilson House

Claiborne County
CHAMBER OF COMMERCE
Tazewell, Tennessee

July 19, 1961.

Mr. Herbert D. Vogle
Chairman of TVA
Knoxville, Tennessee

Dear Sir:

The Claiborne County Chamber of Commerce have undertaken to obtain cheaper power in Claiborne County, especially the cities of Tazewell, New Tazewell and Cumberland Gap.

We are at the present time obtaining power from Kentucky Utilities.

The people of our county are requesting the Claiborne County Chamber of Commerce to do everything within its power to obtain TVA power.

A committee has been designated to seek information in this matter.

We would appreciate an appointment with you or whoever you may designate to discuss our problems in regard to electrical power.

Yours truly, William R. Stanifer, Executive Secretary.

[Copy Illegible]

[fol. 1268]

Manager's Files

July 26, 1961.

Mr. William R. Stanifer, Executive Secretary
Claiborne County Chamber of Commerce
Tazewell, Tennessee

Dear Mr. Stanifer:

This is in reply to your [attached] letter of July 19 requesting a meeting to discuss future power supply in Claiborne County.

The question of future power supply for the people of Claiborne County has been discussed several times during past years with various interested officials of this area. [See 332.51 Middlesboro, Ky.] In February 1960, a number of representatives from several towns in this area met with the TVA Board. It was suggested that the people of the cities in Claiborne County might wish to talk to the Powell Valley Electric Cooperative about obtaining electric service since the cooperative distributes TVA power in most of this county. This situation does not appear to have changed since that meeting; however, if you feel that it would be helpful to discuss the matter further, we will be glad to have members of our power staff meet with you. Mr. C. Wilson House, District Manager of the Office of Power in Knoxville, will get in touch with you and arrange for such a meeting if you desire it.

Very truly yours, Herbert D. Vogel, Chairman.

AOD:PSB:SB

CC: Mr. A. R. Jones, 404 NSB.
Mr. A. J. Wagner, 405 NSB.
Mr. L. J. Van Mol, 411 NSB.
Mr. G. O. Wessenauer, 818 PrB. C.
Mr. C. J. McCarthy, 624 NSB.
Miss Marguerite Owen, Washington.
Mr. C. Wilson House, 418½ UAB.

[fol. 1269] August 7, 1961.

Mr. William R. Stanifer, Executive Secretary
Claiborne County Chamber of Commerce
Tazewell, Tennessee

Dear Mr. Stanifer:

This is in reference to General Vogel's attached letter of July 26 advising you that TVA's power staff would be glad to meet with you to discuss future power supply in Claiborne County.

If you think such a meeting is desirable, we will be glad to meet you in my office, 418½ Union Avenue, Knoxville, on Tuesday, August 15, at any time, or on Monday afternoon, August 14. It will be appreciated if you will advise me if either of these dates is satisfactory with your committee.

Very truly yours, Tennessee Valley Authority. C. Wilson House, District Manager, Office of Power

CWH:MDE

CC: Paul S. Button, 815 PRB, Chatta.
Lewis E. Wallace, 616 NSB,
G. O. Wessenauer, 818 PRB, Chatta.

[fol. 1270]

Claiborne County
CHAMBER OF COMMERCE
Tazewell, Tennessee

August 10, 1961.

C. Wilson House
District Manager
Office of Power
Tennessee Valley Authority
Knoxville, Tennessee

Dear Sir:

In reference to your attached letter of August 7 we would appreciate meeting as you suggest on next Tuesday August 15.

We will be at your office at 2:00 p.m.

Yours truly, William R. Stanifer, Executive Secretary.

WRS/lh

[fol. 1271]

August 11, 1961.

Mr. William R. Stanifer, Executive Secretary
Claiborne County Chamber of Commerce
Tazewell, Tennessee

Dear Mr. Stanifer:

We are looking forward to seeing you in my office on Tuesday, August 15, at 2:00 p.m.

Very truly yours, Tennessee Valley Authority. C. Wilson House, District Manager, Office of Power.

CWH:MDE

CC: Paul S. Button, 815 PRB, Chatta.
Lewis E. Wallace, 616 NSB.

[fol. 1272] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 3 to deposition of C. Wilson House

EXHIBIT No. 70

Tennessee Valley Authority
UNITED STATES GOVERNMENT

Memorandum

To: Manager's File, 531 PRB, Chattanooga
From C. Wilson House, District Manager, Eastern District, 418½ UAB, Knoxville
Date: September 1, 1961
Subject: Meeting with Representatives of Claiborne County (Tennessee) Chamber of Commerce.

A meeting was held in my office on August 15, 1961, to discuss future power supply in Claiborne County. The Claiborne County Chamber of Commerce was represented by Messrs. Wlliam R. Stanifer, Executive Secretary of the Chamber of Commerce; DeBus, Mayor of New Tazewell; Miller; and Coffier. (I am not sure of above names except Stanifer.) TVA was represented by Paul S. Button, Lewis E. Wallace, and C. Wilson House.

1. Summary of information given by the representatives of the Chamber of Commerce.

While they represent all the towns in Claiborne County, they appeared to be most concerned with Tazewell, New Tazewell, and Cumberland Gap. The people are very anxious to obtain TVA power in order to have lower rates and be in a better position to obtain industry. Kentucky Utilities' rates are about double those of Powell Valley Electric Cooperative. The people served by Kentucky Utilities have been very anxious to obtain TVA power for many years but the Chamber of Commerce is the first organization to work through.

Tazewell has a population of about 1,500, New Tazewell 900, and Cumberland Gap 600. Kentucky Utilities serves a population estimated at 5,000 to 7,000 in Claiborne County. Between 10% and 15% of the customers inside the corporate limits of both Tazewell and New Tazewell

are now served by the cooperative and the remainder by Kentucky Utilities. No customers are served by cooperative in Cumberland Gap.

Kentucky Utilities had a county franchise in Claiborne County and served customers in Tazewell and New Tazewell before either was incorporated. Neither town has granted a franchise to Kentucky Utilities. It is believed that Cumberland Gap has never given a franchise to Kentucky Utilities.

[fol. 1273] 2. Summary of information given to Chamber of Commerce members by TVA representatives.

Due to present territorial limitations in the TVA Act, it is not believed that TVA power could be furnished to Cumberland Gap. Further study and consideration will be necessary for TVA to decide whether or not Tazewell and New Tazewell could receive TVA power in the absence of amendment to the Act. Results of possible court action on interpretation of territorial limitations in TVA Act might help in making such a decision.

If TVA power can legally be furnished Tazewell and New Tazewell, it appears, due to their size, that the only feasible and most economical way would be by the cooperative.

Powell Valley Electric Cooperative has a 5-year territorial agreement [filed 332.53 Powell Valley E.C.] with Kentucky Utilities which the cooperative cannot terminate until January 1964 or, possibly, January 1963.

Not much can be done at this time. In a year or two the situation may become clearer. The towns should be patient but at the same time do anything they think might help their situation. They should refrain from taking any action which would in the future make a changeover to TVA power impossible, such as granting a long-term franchise. TVA is interested and is in sympathy with their desires.

C. Wilson House.

CWH:MDE

CC: Paul S. Button, 815 PRB, Chattanooga,
Lewis E. Wallace, 616 NSB, Knoxville.

[fol. 1274] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 4 to deposition of C. Wilson House

James E. Watson, Director, Division of Power Marketing,
818 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District,
418½ UAB, Knoxville

June 12, 1961

Powell Valley EC—Service Area in Tennessee

We are attaching a copy of letter agreement dated January 8, 1958, between the Powell Valley Electric Cooperative and Kentucky Utilities. This letter agreement was for the purpose of establishing a basis for avoiding conflicts between the systems and is for a term of five years. I understand that this agreement covers facilities and customers in Tennessee only.

We are also attaching a copy of a proposed territorial agreement between the Powell Valley Electric Cooperative and Kentucky Utilities Company covering electric transmission and distribution facilities in Claiborne County, Tennessee. Also attached are one print each of the two sections of map which is a part of the proposed agreement. Mr. Berry, manager of the cooperative, advises me that Kentucky Utilities presented this proposed agreement to the cooperative for execution. He further advised that they have not and do not intend to execute it.

We are sending Mr. McCarthy two copies each of the letter agreement, proposed agreement, and two sections of map.

One copy of each of the attachments are being sent to Manager's Files.

We are preparing and will send to you and Mr. McCarthy information on the service area of the cooperative in Virginia in a few days.

C. Wilson House.

CWH:MDE

Attachments: 4

CC: C. J. McCarthy, 609 NSB, Knoxville

[fol. 1275]

Kentucky Utilities Company
120 South Limestone Street
Lexington, Kentucky

Office of Vice President

January 8, 1958.

Powell Valley Electric Cooperative
Jonesville
Virginia

Gentlemen:

This letter is written to revise my letters of September 4, 1957, and December 16, 1957, for the purpose of establishing a basis for avoiding conflicts between our respective systems, in accordance with the understanding reached at the meeting held in our offices on August 13, 1957, at which were present, in addition to representatives of this Company, Mr. McNiel, your attorney, Mr. Cridlin, and Mr. Ralph Foreman of the Rural Electrification Administration, and in accordance with our further discussions of more recent dates.

It is agreed that during the term of this agreement:

1. Neither the Company nor the Cooperative shall serve any customer at any given location, which location is taking service from the other party, or where customer has terminated service at such location from one of the parties and acts to follow that termination by accepting service from the other party.
2. Any new load shall be served by the one of us whose facilities, taking into consideration territorial boundarees either fixed or following from logical considerations, are closest to such load.
3. In any instance where there are differences between us as to the application of paragraphs 1 or 2 above, each party will consult with the other in an honest effort to resolve their differences, and in all such instances the differences of the parties shall be resolved upon an equitable basis.
4. This agreement shall remain in effect for a period of five years from the date of your acceptance of this letter, and shall continue in effect thereafter from year to year subject to the right of either of us to

terminate the agreement at the end of any annual extension, by giving notice to the other not less than ninety days prior to the effective date of termination.

[fol. 1276] If the foregoing is satisfactory to you, will you please have executed by your President, and return to us one of the three copies of this letter.

Very truly yours, Kentucky Utilities Company, By W. H. Skinner, Vice President.

WHS:vch.

cc: RJForeman

Accepted and agreed to: Powell Valley Electric Cooperative.

By Loyd Muncy, Vice President.

Dated: Jan. 16th, 1958.

[fol. 1277] AGREEMENT

(Proposed)

This agreement, dated —— 1961, between Powell Valley Rural Electric Cooperative Corporation hereinafter referred to as Powell Valley and Kentucky Utilities Company, Inc., hereinafter referred to as K. U.

Witnesseth

Whereas, K. U. owns and operates certain electric transmission and distribution facilities in Claiborne County, Tennessee, and,

Whereas, Powell Valley also owns and operates certain electric transmission and distribution facilities in Claiborne County, Tennessee, and,

Whereas, during past years, in the normal expansion of both the systems of K. U. and Powell Valley there have been certain conflicts develop with reference to areas to be served by each system and,

Whereas, it is the desire of both Powell Valley and K. U. to avoid such conflicts and misunderstandings as to the areas to be served by their respective systems and,

Whereas, it is considered to be to the best interests of Powell Valley, Kentucky Utilities, the customers served by each, and the public, that an agreement be entered into designating the areas that are to be served from the respective systems of the parties hereto.

Now, therefore, it is agreed between the parties hereto as follows:

1—The geographical areas that are to be served by the system of Powell Valley and the geographical areas that are to be served by the system of K. U. are to be confined to the areas shown on Map No. —, in two sections, which map is dated —— —, 1961 and approved by both parties.

2—It is understood that in the area shown on map, and designated as Powell Valley service area, that K. U. now serves certain customers in this area and will [fol. 1278] continue to serve these customers, but K. U. will not offer or extend their service to any other customers in the area shown as Powell Valley except with the consent of Powell Valley.

3—It is understood that in the area shown on map and designated as K. U. service area, that Powell Valley now serves certain customers in this area and will continue to serve these customers, but Powell Valley will not offer or extend their service to any other customers in the area shown as K. U. except with the consent of K. U.

4—It is fully agreed by both parties that in event any prospective customer requests service of them in the area designated as service area of other party, that such prospective customer will be referred to proper representatives of the party in whose service area the service is desired.

5—In event any situation should develop where there is some question as to which party should extend service to customer, under provisions of this agreement, then such question will be settled by mutual agreement of the parties hereto, before any commitment is made by either party to the prospective customer.

In Witness Whereof, the parties hereto have caused their names to be hereunto subscribed by their representatives thereunto duly authorized as to the day and year first written above.

Powell Valley Rural Electric Cooperative.
By ——, ——.

Attest:
——, ——.

Kentucky Utilities Company.
By ——, ——.

Attest:
——, ——.

[fol. 1279] Tennessee Valley Authority
Knoxville, Tennessee

June 12, 1961.

Mr. F. E. Berry, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Red:

We are enclosing the original letter agreement dated January 8, 1958, between your cooperative and Kentucky Utilities and the copy of proposed agreement between your cooperative and Kentucky Utilities covering facilities in Tennessee which you loaned us. As requested, we are also enclosing two copies of the letter agreement.

We are sending to you, under separate cover, the tracings of the two sections of map showing proposed territorial boundary together with two prints of each.

As soon as we have completed making copies of the information on your system in Virginia, someone from my office will bring it to you.

We certainly appreciate your assistance in this matter.

Very truly yours, Tennessee Valley Authority. C. Wilson House, District Manager, Office of Power.

Enclosures: 4

[fol. 1280] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 5 to deposition of C. Wilson House

POWELL VALLEY ELECTRIC COOPERATIVE
REA

Jonesville, Virginia

Cooperative
Electricity

Telephone
Jonesville 52

F. E. Berry
Manager

August 11, 1961.

Mr. C. Wilson House
District Manager
Office of Power
Tennessee Valley Authority
Knoxville, Tennessee

Dear Mr. House:

I am enclosing Planimetric [attached] Map 154-NE, Tazewell, Tennessee, showing in pencil the lines of the Powell Valley Electric Cooperative with individual services shown as round dots. Field work of this map was done in November and December, 1957.

I am also enclosing certain [attached] sketches which were drawn up by the Kentucky Utilities Company of complaints in and around Tazewell, Tennessee, which I believe are self-explanatory.

We hope that these will be of some use to you.

Very truly yours, Lewis H. Oatts, Office Manager.

LHO:mrr

Reproduced copy—

Mgr. File

[fol. 1281]

Attached
8-11-61

MEMORANDUM

Certain Complaints made by the Kentucky Utilities Company against the Powell Valley Electric Cooperative for Construction Practices in the area of Tazewell and New Tazewell, Tennessee, in a letter from Mr. W. H. Skinner, Vice President of Kentucky Utilities Company, Lexington, Kentucky, to The Honorable David A. Hamil, Administrator, Rural Electrification Administration, Washington, D. C.

These complaints are not new by any means. In fact, this situation has been discussed by both the Kentucky Utilities Company and the Powell Valley Electric Cooperative for some time.

On May 13, 1955, Mr. Davis L. McNiel, Manager, Mr. Joseph N. Cridlin, Attorney, and Mr. Ralph J. Foreman of the Administrator's Office of REA at the invitation of Mr. R. M. Watt and by his appointment were to meet at the office of Mr. Watt in Lexington to discuss this matter. However, after arriving in their office and talking with members of their staff for some time without any formality, the members of the Kentucky Utilities Company staff present brought up the question at hand. Representatives of the Cooperative were still hoping to see Mr. Watt. However, he made a brief appearance, spoke to each of us, and immediately left the room. Since that time, the situation has been at a standstill.

The Cooperative having extended service to only two customers who arranged for service which had not already been worked out prior to May 1955.

The complaints of the Kentucky Utilities Company together with letters and [attached] sketches are all biased, misleading, and do not tell the true story by any means.

The position taken by the Kentucky Utilities Company is that a Cooperative should not be allowed to serve any customer that the power company wants to and can serve

profitably. Naturally, the Cooperative does not agree with this thinking.

[fol. 1282] In 1952 when an interchange agreement [TV-12890A, filed 332.53 Powell Valley EC Contract] was reached between the Cooperative, Kentucky Utilities Company, and the Tennessee Valley Authority for joint use facilities at Tazewell, Tennessee, an agreement was reached and is in writing to the effect that neither the Kentucky Utilities Company nor the Powell Valley Electric Cooperative will serve any consumer who is now being served by the other party.

[fol. 1283] Comments by Powell Valley Electric Cooperative

Sketch No. 1

In 1948 a new State Route 33 was under construction east and west through and connecting the small towns of Tazewell and New Tazewell, Tennessee. The Cooperative had in the meantime received several applications for service along this new road. The Cooperative also needed a route for a feeder line accessible for maintenance purposes. A part of this proposed line was built and plans were under way to construct the remainder along this new road when the Kentucky Utilities Company moved in virtually over night on a cost plus basis built the line marked on Sketch No. 2 as built in 1927 along this new route without any customers whatsoever.

Further in this sketch, Kentucky Utilities Company shows line constructed in 1945. We might add that this line was constructed to prospective members of the Powell Valley Electric Cooperative who had signed for electric service but were not able to get the service immediately after they had signed because of shortage of materials and restrictions during World War II. Inasmuch as the Kentucky Utilities Company built line in the Cooperative's signed territory, there would be conflicts in this area to some degree.

Furthermore, in 1955 a small shirt factory asked the Cooperative for and received single phase power, and they later wanted three phase power. A contract was prepared and presented to the shirt factory concern. However, the Kentucky Utilities Company also bid for the service and

despite the fact that a written agreement between the Kentucky Utilities Company and the Cooperative to the effect that neither one would serve a consumer who is now being served by the other, the Kentucky Utilities Company is now serving this load with three phase power.

[fol. 1284] Comments by Kentucky Utilities Company

Sketch No. 1

In 1948 the Powell Valley RECC constructed approximately 4000 ft. of single phase 7.2 KV line to serve a small coat hanger factory, which factory could have been served by a service drop only from Kentucky Utilities Company's facilities. The cooperative extension crossed lines of the company at three different locations. They have, of course, since the original construction connected several other customers that could have been served directly from the company's system.

[fol. 1285] Comments by Powell Valley Electric Cooperative

Sketch No. 2

The Powell Valley Electric Cooperative at the request of old members built to a dairy bar and filling station inside the city limits of Tazewell from a line which was in existence inside the corporate limits at the time of the incorporation of the town.

As we see it, the Corporation line at the time that the town was incorporated has nothing to do with the matter as the Kentucky Utilities Company and the Powell Valley Electric Cooperative were well established in this area prior to the incorporation.

There is some question as to whether this dairy bar and filling station would have been built had they not been able to get service from the Cooperative.

[fol. 1286] Comments by Kentucky Utilities Company

Sketch No. 2

Extension constructed by Powell Valley RECC during May of 1956 to serve a filling station and a dairy bar inside

the city limits of Tazewell, Tennessee, each of which establishments could have been served by a service drop from Kentucky Utilities Company's facilities in existence since 1939 or 1940.

[fol. 1287] Comments by Powell Valley Electric Cooperative

Sketch No. 3

Line along this new highway as shown in Sketch No. 3 is a part of system improvements shown in our system study. This line is poled and what conductor has been strung to date is the proper size for three phase heavy feeder line. Prior to the building of this line, the Cooperative had an application for power for the service station which was connected in 1956. The other two connections which were made had been promised to landowners at the time these new establishments were built. However, we did refuse to serve Mr. Rose's home which at that time and is now being served by the Kentucky Utilities Company.

[fol. 1288] Comments by Kentucky Utilities Company

Sketch No. 3

Extension construced by Powell Valley RECC during October of 1956 to serve buildings owned by a Mr. Rose, each of which could have been served by a service drop only from Kentucky Utilities Company's facilities, in existence since 1936.

[fol. 1289] Comments by Powell Valley Electric Cooperative

Sketch No. 4

Sketch No. 4 is for most part a duplicate of Sketch No. 3.

In the Tazewell area both the Powell Valley Electric Cooperative and the Kentucky Utilities Company receive distribution voltage from the same substation owned by the Cooperative, therefore, congestion of lines in the area can not be avoided.

Since this station went into service in 1953, the Cooperative has been at work extending feeders into this area from this substation. This feeder line along the new highway

is, as mentioned in Sketch No. 3, a part of the Cooperative's system improvements and is now feeding a large area known as the Cloud Switch and Cave Spring area.

Applications for all service along this line were made to the Cooperative prior to the building of the line. Having had five of them on file before the line was constructed. Naturally, in securing right of way, it was necessary to obligate ourselves to serve other new loads or applicants at such time as they are built. Two of these are noted on Sketch No. 3 and can also be noted that all were within one or two poles from present facilities.

We might add here that since this line has been constructed the Kentucky Utilities Company has built two spans of line to serve one street light which could have been served by the Cooperative by a pole which was already in existence.

[fol. 1290] Comments by Kentucky Utilities Company

Sketch No. 4

Extension constructed by Powell Valley RECC along new highway 25E for a distance of approximately 1½ miles during the early part of 1955, and at the time of construction there was not a single building or residence to be served along the entire route. Note that Kentucky Utilities Company's distribution facilities were within one or two poles of the new highway location for the entire distance of this extension and had been in their location since 1936.

[fol. 1291] Comments by Powell Valley Electric Cooperative

Sketch No. 5

The Powell Valley Electric Cooperative had been serving Tyler & Ratliff Company since January 14, 1954, with all the power that they required at that time. In the spring of 1954, this company requested the Cooperative to furnish 350 H. P. of three phase power. This load was far in excess of existing facilities to the quarry at that time, therefore a proposal and contract was prepared and presented to Tyler & Ratliff Company making provisions for the Cooperative to furnish them with all the power desired. This proposal provided for 2.13 miles of three phase line which

at that time would be solely for the use of the quarry. The Tyler & Ratliff Company thought the Cooperative's proposal was a little high and naturally turned to the Kentucky Utilities Company to play both ends against the middle.

Manager McNiel and other representatives of the Cooperative met with Mr. Woodson, Mr. Asher, and other representatives of Kentucky Utilities Company at that time. Manager McNiel stated to Mr. Asher that negotiations were under way with these people and it was felt that a satisfactory solution could be worked out. Manager McNiel stated to Mr. Asher that surely Kentucky Utilities Company was not thinking of serving this quarry since the Cooperative was already serving them and that Kentucky Utilities Company should understand that Tyler & Ratliff Company were playing both ends against the middle.

The Kentucky Utilities Company's comments on attached Sketch No. 5 are very misleading.

[fol. 1292] Comments by Kentucky Utilities Company

Sketch No. 5

In May of 1954 the R. B. Tyler Company and W. T. Ratliff Company were operating a rock quarry on Cedar Fork Road about 2500 ft. from the end of Kentucky Utilities Company's distribution facilities in Tazewell.

Representatives of the above companies contacted Mr. Woodson, Kentucky Utilities Company's Manager, and requested that he submit to them a proposal covering the furnishing of electric service for the operation of their rock quarry, which total load amounted to approximately 350 H.P.

Representatives of the above company were advised that their quarry was in what the Company considers the service area of Powell Valley RECC and that this matter would first be discussed with Mr. McNiel, Manager of Powell Valley RECC, before submitting a company proposal. On June 17, 1954, Mr. Woodson and Mr. Asher, of Kentucky Utilities Company, met with Mr. McNiel near the quarry site and discussed the matter fully with him. As a result of the meeting, Mr. McNiel arranged to extend service to the quarry operation.

[fol. 1293] Comments by Powell Valley Electric Cooperative

Sketch No. 6

Sketch No. 6 is rather a long story about an extension of service to Mr. Welch.

The fact that Mr. Welch is or was at that time a County Official has nothing to do with the matter whatsoever.

In 1941, the Powell Valley Electric Cooperative accepted applications for serving several homes in this area. Each of these homes had for a number of years tried to get Kentucky Utilities Company, which at that time was Dixie Power & Light Company, to extend service to them.

By 1945, the Cooperative was preparing to make extensions and by 1946 most of the line construction was near completion. However, Kentucky Utilities Company in the meantime had built 1½ miles of line and served a few of these people.

Since then the two towns have been incorporated and some farm land has been sold as lots. Before buyers of these lots would purchase they ascertained from the Cooperative whether the Cooperative would serve them, if not they would not buy. Several of these lots were bought only after it was assured them that the Cooperative would serve them. As a result of this, some five connections were made on line which Kentucky Utilities Company referred to as being built for Mr. Welch alone.

[fol. 1294] Comments by Kentucky Utilities Company

Sketch No. 6

Extension built by Powell Valley RECC during the latter part of 1955, which extension was approximately 1000 ft. in length to serve Mr. Welch (a County Official); whereas, this residence could have been served by a service drop from Kentucky Utilities Company's existing facilities.

[fol. 1295] Comments by Powell Valley Electric Cooperative

Sketch No. 7 (Zinc Mine Line)

Comments attached by Kentucky Utilities Company in

regard to this situation are untrue, half true and very misleading.

Late in 1943 or early in 1944, Mr. Johnson Crawford of Universal Exploration Company contacted Manager McNiel for power to the Zinc Mine in what is known as the Straight Creek area of Claiborne County about 5 miles south of New Tazewell. At this time the Cooperative had single phase line very close this zinc mine and had virtually all of the surrounding county including that back near Tazewell signed for service from the Cooperative. The Cooperative to date has these applications for service in their files.

Manager McNiel met with Universal Exploration Company and representatives of REA, and an Agreement was worked out whereby the Cooperative would build a 33,000 volt line into the area whereby a new source of power would be taken from Kentucky Utilities Company at Cumberland Gap. The Cooperative would construct a transmission line and substation which would not only serve the Zinc Mine but would have service available for all the applicants for service in the surrounding area.

Mr. Howard Asher of Kentucky Utilities Company was contacted about additional service at Cumberland Gap, and a Contract for this purpose was prepared and delivered to Mr. Asher. Mr. Asher stated that he was going to Lexington the next week and would have it signed by Mr. Watt. However, it happened that Mr. Watt had just returned from a EEI Meeting somewhere in the east and at this meeting, as the story was related to me, the President Of U. S. Steel of which Universal Exploration Company was a subsidiary was talking with Mr. Watt and some time during this conversation the President of U. S. Steel made the statement, "By the way, one of our subsidiarys, Universal Exploration Company, is preparing to open up a Zinc Mine near Tazewell, Tennessee, and we want you people to do us right about power." Therefore, when the Contract for a new source of power for the Cooperative at Cumberland Gap was presented to Mr. Watt he did not sign it. As a result, representatives of Kentucky Utilities Company went after the business and due to the fact that Kentucky Utilities Company could serve the Zinc Mine load *only* with less restricted material than the Cooperative, the end result was that this was taken away from

the Cooperative and constructed by Kentucky Utilities Company, and I have understood at the Federal Government's expense.

[fol. 1296] In constructing this line to the Zinc Mine, the Kentucky Utilities Company (at that time known as the Dixie Power & Light Company) did not build their line by way of the nearest route to the proposed Zinc Company load. Instead they routed their line over a longer route and in such a way as to raid territory along the route where particularly every prospective consumer had made application to the Cooperative for service. During the time that this line was under construction by the Power Company, the Cooperative was also building a line to the Food Processing Plant some 10 miles west of Tazewell. The Cooperatvie's entire line was constructed in accordance with the War Production Board Rules which were in effect. This was borne out by the fact that the Cooperative was reported to and a hearing held before the War Production Board in this respect, and was cleared of any charges. There were no consumers connected to this line which did not fully comply with all requirements and rules of the War Production Board.

The last paragraph of their remarks in regard to Sketch No. 7 is absolutely untrue.

[fol. 1297] Comments by Kentucky Utilities Company

Zinc Mine Line—Sketch No. 7

During the early part of 1944 contract was executed with the Universal Exploration Company for furnishing service to a zinc mine development which was located about five miles south of New Tazewell in what is known as the Straight Creek area of Claiborne County.

At this time regulations restricting the use of critical materials were in effect by the War Production Board, and it was necessary to obtain War Production Board approval before the necessary line could be constructed to serve this load.

War Production Board approval was obtained and during June of 1944 the 12 KV line extension to serve this load was constructed.

At the same time that the line extension approved for construction by Kentucky Utilities Company was in prog-

ress, the Powell Valley RECC shortly thereafter began the construction of an extension immediately parallel to the Company's line, which construction was carried through to conclusion without any approval from the War Production Board.

In order for the company to serve any customers along the line being constructed it was necessary that the customer obtain a certificate from the County Agricultural Agent and to certify that he had sufficient animal units to justify the extension to his farm, and the Company connected all customers that could properly qualify. The Powell Valley RECC constructed extensions to several farm customers which required a longer extension than would have been required for service from Company's lines, which customers could not qualify for service.

[fol. 1298] Comments by Powell Valley Electric Cooperative

Sketch No. 8

In this sketch it is stated or inferred that the Cooperative built 1200 feet of line to serve several customers that could have been served by Kentucky Utilities Company.

To clear up this: In 1946, Mr. Fred McMurry after being told by Kentucky Utilities Company that at no reasonable date could they connect him asked the Cooperative to make a connection to a new home he was building. This line was constructed and Mr. McMurry began to pay a light bill on or about 9-19-46. As a result, five houses have been added by service drop and a one pole primary extension accounts for three more. Another two dwellings and two places of business were refused service and told to contact Kentucky Utilities Company.

[fol. 1299] Comments by Kentucky Utilities Company

Sketch No. 8

This shows a situation where the Powell Valley RECC constructed approximately 1200 ft. of primary extension to serve several customers that could have been served from Kentucky Utilities Company's facilities with a one or two pole extension.

[fol. 1300] Comments by Powell Valley Electric Cooperative

Sketch No. 9

This is a duplication of part of line and charges as per Sketch No. 3.

[fol. 1301] Comments by Kentucky Utilities Company

Sketch No. 9

An extension constructed by Powell Valley RECC during the early part of 1956, which extension crossed Kentucky Utilities Company's lines at two locations to serve a residence built by a Mr. Rose, which residence could have been served by a service drop only from Company's existing distribution.

[fol. 1302] Comments by Powell Valley Electric Cooperative

Sketch No. 10

This service which was constructed for Mr. Essary at both his request and the party who owned the land at the time the filling station was being constructed. Service was extended and used for construction purposes. All the line in yellow on this sketch was not constructed for this service, but this service only required 500 feet of line for new service from existing line.

[fol. 1303] Comments by Kentucky Utilities Company

Sketch No. 10

This shows an extension of approximately 500 ft. of primary line constructed by Powell Valley RECC during October or November of 1955 to serve a filling station owned by Joe Frank Essary, which station could have been served by a service drop of approximately 50 ft. in length from Kentucky Utilities Company's facilities, which facilities had been in their location for at least ten years.

[fol. 1304] Comments by Powell Valley Electric Cooperative

Sketch No. 11

In this sketch, there is also misrepresentation. Check *Sketch.*

The Cooperative built a long line with taps to serve the Greers Chapel area, which had been unable to obtain service from Kentucky Utilities Company. This line ended at a point so marked on the sketch. This line had been energized some several months when two new buildings were started along Highway No. 25 E. Application was made by these parties for power and the buildings were served.

After the Cooperative had been serving one of these homes for quite some time, the man owning the home became delinquent in his payment for electric service and as a result disconnected from the Cooperative and Kentucky Utilities Company extended service to this home which was already being served by the Powell Valley Electric Cooperative. Kentucky Utilities Company serves this home today. Since that time Powell Valley Electric Cooperative has served other houses with short extensions. Kentucky Utilities Company has done likewise finding it necessary to cross the Cooperative's lines to do so.

[fol. 1305] Comments by Kentucky Utilities Company

Sketch No. 11

This shows an extension constructed by Powell Valley RECC during 1944 to serve several residences near Pattersons Cross Roads just south of Harrogate, Tennessee, which customers could readily have been served by the Kentucky Utilities Company by either service drop or a one or two pole extension. The cooperative constructed a line approximately one and one-half miles in length to serve these customers.

[fol. 1306] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 6 to deposition of C. Wilson House

TV-11505A

Interconnection Agreement Between Tennessee Valley Authority and Kentucky Utilities Co.

This agreement, made and entered into as of the 22d day of March 1951, by and between Tennessee Valley Authority (hereinafter called Authority), a corporation created and existing under and by virtue of the Tennessee Valley Authority Act of 1933 as amended, and Kentucky Utilities Co. (hereinafter called Company), a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Kentucky; witnesseth:

Whereas Company and Authority are parties to certain agreements entered into heretofore which, among other things, provide for interconnections, transfer, interchange and sale of power as provided under the terms and conditions specified in said agreements; and

Whereas Authority has received requests from its wholesale customers, Warren Rural Electric Cooperative Corp. and Hickman-Fulton Rural Electric Cooperative Corp. for additional points of delivery to the former at Rosine and Leitchfield and increased capacity at existing points of delivery to the latter at Clinton and Hickman, Ky., in order to permit said cooperatives to serve customers now being supplied by them and to serve new customers in their respective service areas who are not now receiving electric service; and

Whereas Company and Authority desire to execute a new agreement to provide for the expansion of certain interconnection facilities, the establishment of certain new delivery points, and the interchange, delivery and exchange of power between their respective systems and to that end to consolidate, combine and supersede as stated herein the various provisions with respect to these matters contained in said agreements heretofore entered into;

Now, therefore, in consideration of the premises and of the mutual promises hereinafter set forth and subject to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the parties hereto agree as follows:

Article I

Interconnections

1. *Interchange points.*—Company and Authority will operate and maintain interconnections between their respective systems for the interchange, transfer and sale of power between them at the following points:

(*a*) The existing point of interconnection (hereinafter called Pineville Interconnection) at Pineville, Ky., as provided for in agreement TV-84885 dated September 1, 1944, as amended and supplemented;

(*b*) The existing point of interconnection (hereinafter called Kentucky Dam Interconnection) at Kentucky Dam, as expanded in accordance with this agreement;

(*c*) The existing point of interconnection (hereinafter called Martin Interconnection) at Authority's primary substation at Martin, Tenn.;

(*d*) The existing point of interconnection (hereinafter called Fulton Interconnection) at Fulton, Ky.; and

(*e*) A new point of interconnection (hereinafter called Glasgow Interconnection) to be established as hereinafter provided in this agreement.

The systems of the parties shall be and remain interconnected at said interchange points insofar as this can be done in the opinion of each party without injury to its system or to service to its customers.

2. *Expansion of Kentucky Dam interconnection.*—Authority shall at its own expense furnish all materials and equipment for and perform all work necessary in (*a*) the construction, maintenance and operation of approximately 0.75 mile of transmission line which will loop circuit No. 2 of Company's 69-kilovolt Earlington-Paducah transmission lines to Authority's Kentucky Dam switchyard, and (*b*) the installation, maintenance and operation at Kentucky Dam of an oil circuit breaker terminal and associated equipment

and speedomax type telemetering facilities for Authority's own use. The load impulses that are used to operate said telemetering equipment shall be available to Company for operation of similar telemetering equipment. Company shall furnish and install, and thereafter maintain, at its own expense a suitable take-off structure at the point where the line to be constructed by Authority will connect to Company's Earlington-Paducah transmission line. Authority shall also install, and thereafter maintain and operate, at its own expense at Kentucky Dam suitable equipment to provide carrier communication with Company at Company's Green River plant. Company shall install, and shall thereafter own, maintain and operate, at its own expense on its system such facilities as are necessary to complete said carrier communication system.

It is recognized that Company has been paying Authority a monthly charge of $660.84, representing one half of 1 percent per month of the total installed costs of the existing Kentucky Dam Interconnection, as Company's share of the cost of the existing interconnection facilities. Company shall continue to pay this monthly charge to Authority during the term of this agreement. When, in Authority's opinion, improvements or expansion of the existing Kentucky Dam interconnection facilities becomes necessary, such improvements or expansion shall be made by Authority and Company shall thereafter pay to Authority, in addition to the above-mentioned monthly charge, one-half of 1 percent of the net cost, including applicable overheads, of such improvements or expansion in facilities.

3. *Glasgow interconnection.*—Company shall construct or cause to be constructed at no expense to Authority a 69-kilovolt transmission line from Authority's Summer Shade-Bowling Green 69-kilovolt line to Glasgow, Ky., and an air break switch at the point of connection and a delta-delta 66-33-kilovolt substation at Glasgow protected by an oil circuit breaker on the 33-kilovolt side and fuses on the 69-kilovolt side. In the event that during the term of this agreement Company replaces the transformer bank in said substation with a Y-connected bank of transformer, Company shall install a high side 69-kilovolt oil circuit breaker. Company shall install in connection with the construction of said substation necessary facilities for coordination with Au-

thority's system and settings on protective devices will be coordinated with Authority. Company shall own, maintain, and operate or cause to be maintained and operated said transmission line and substation.

Article II

Delivery Points

1. *Present delivery points.*—Company and Authority will maintain present delivery points at Clinton and Hickman, Ky., for service to Hickman Fulton Rural Electric Cooperative Corp. and at Pruden, Tenn., for service to LaFollette, Tenn.

2. *Installation of facilities for delivery point at Rosine.*—Company shall at its own expense construct, maintain and operate a 66-kilovolt suspension insulator ground wire type transmission line of at least 266,800 circular mill ACSR conductor from a point in the vicinity of Beaver Dam, Ky., to a substation site to be selected and acquired by Authority near Rosine, Ky. Authority shall at its own expense construct a substation for service to Warren Rural Electric Cooperative Corp. at Rosine (hereinafter called Rosine Substation) which will be suitable for 33- or 66-kilovolt operation. Said substation shall be owned, maintained and operated by Authority.

3. *Installation of facilities for delivery point at Leitchfield.*—Authority shall construct at its own expense a 33-kilovolt substation for service to Warren Rural Electric Cooperative Corp. on a site to be selected and acquired by Authority at or near Leitchfield, Ky. (hereinafter called Leitchfield Substation). Said substation shall be connected to the Company's Elizabethton-Leitchfield 33-kilovolt line and shall be constructed in such manner that it may be converted to 66-kilovolt operation if and when the Company converts said transmission line to operation at 66 kilovolts. Company will provide, install and maintain, at its own expense, suitable take-off facilities for this tap connection. Said substation shall be owned, maintained and operated by Authority.

4. *Additional points of delivery.*—Additional points of delivery may be established by agreement of the parties.

Article III

Exchange and Emergency Transactions

1. *Delivery to Authority.*—During the term of this agreement Company shall deliver power at approximately sixty (60) cycles per second to Authority at the delivery points designated below up to the maximum demands, and at the normal delivery voltages specified below, for each delivery point, as follows:

[fol. 1307]

Delivery point	Maximum demand	Present delivery voltage	Future delivery voltage
	Kilovolt amperes		[copy illegible]
High side of Company's Pruden substation[1]	1,500	33,000	—
High side of Authority's Clinton substation	2,500	66,000	—
High side of Authority's Hickman substation	1,500	33,000	—
High side of Authority's Rosine substation[2]	2,500	33,000	—
High side of Authority's Leitchfield substation[2]	2,500	33,000	—

[1] It is recognized that Authority has been paying Company the sum of $500 per month as compensation for the establishment of this delivery point. Authority shall continue to pay said monthly charge [copy illegible] the elimination by either party of said delivery point upon 18 months' written notice.

[2] The delivery of power at these points shall commence as soon as practicable after execution of [copy illegible] agreement.

Power and energy as measured by metering equipment on the low voltage sides of the above designated substations shall be adjusted for transformer losses to reflect delivery at the respective delivery voltages specified above.

2. *Compensatory deliveries.*—Authority shall deliver to Company at the Fulton Interconnection, and the Glasgow Interconnection, as nearly concurrently as practicable with deliveries to Authority under section 1 of this article III, amounts of power and energy the sum of which shall equal the sum of the amounts of power and energy delivered to Authority at the delivery points specified in said section 1. In order to facilitate the exchange transactions contemplated in sections 1 and 2 of this article III, the load at the delivery points specified in said section 1, the Glasgow Interconnection, and the Fulton Interconnection shall be segregated for radial feed so that the amounts of power and energy delivered to Company under this section 2 will be approximately equal to the deliveries to Authority under

section 1 of this article III. Differences between the deliveries under said section 1 and the deliveries under said section 2 will be compensated for by return of power and energy in kind by the party in whose favor the difference occurs to the other at interconnection points other than those specified in this section 2 in amounts equivalent to said differences: *Provided, however,* That, in compensating for such differences, (*a*) the energy will be returned at times when the load conditions of the party which supplied the energy are similar to conditions on its system at the time when the difference occurred or if said party elects to have the energy returned under different conditions, it shall be returned in such amounts as will compensate for the difference in conditions, and (b) there shall be no compensation for any difference in demands resulting from the supply by one party of the on-peak demands of the other unless such difference exceeds 1,000 kilowatts, in which event the difference shall be settled for by appropriate deliveries at the Kentucky Dam Interconnection and at the interconnection maintained by the parties at Pineville, Ky., or at such other interconnections as may be established by the parties.

3. *Reciprocal emergency transactions.*—If an emergency due to the imminent failure, failure, or breakdown of facilities or any emergency resulting from any cause referred to in section 5 of article V, should occur on the system of one of the parties, the other will, so far as practicable in its sole judgment without hazard to its property or operations and within the limitations of capacity available on its system in excess of that required for supplying its other load; supply power to the party suffering such emergency. Such power shall, at the option of the supplying party, be paid for at the rate of five (5) mills per kilowatt-hour or be returned in kind. If such power is returned in kind it shall be returned under conditions similar to the conditions under which it was supplied, or, if the supplying party elects to have it returned under different conditions, it shall be returned in such amounts as to compensate for the difference in conditions.

Article IV

Economy Interchange Transactions

1. *Interchange of surplus energy.*—In order to promote economy of power supply and to achieve efficient utilization of production capacity, Authority and Company shall each offer to the other in accordance with the provisions of this article IV any surplus energy which is available in the sole judgment of the supplying party. Each party shall promptly inform the other of the extent to which it desires to use such surplus energy and schedules shall be mutually agreed upon. Neither party shall be under any obligation to deliver surplus energy under this article IV in amounts such that after giving effect to any other transactions between the systems of the parties the total deliveries at the points of interconnection would exceed the capacity of the interconnected transmission facilities. The points of delivery for interchange transactions under this article IV shall be the interchange points specified in section 1 of article I of this agreement, and such other points of interconnection as may be established by the parties from time to time during the term of this agreement.

It is understood, in connection with all deliveries of surplus energy under this article IV, that each party shall retain for its own loads and prior commitments the lowest cost energy available to it which, in its judgment, it would utilize if it were supplying only said loads and commitments and that any surplus energy supplied by either party to the other shall be delivered from the most economically available sources of surplus energy for which the supplying party does not have a better market. Neither party shall be obligated to receive, deliver, or transmit surplus power and energy which, in its sole judgment, is in excess of the capacity of its own system, having due regard for its other customers.

2. *Basis of settlement.*—Except as otherwise agreed surplus energy supplied by one party to the other under this article IV shall be settled for as follows:

(*a*) Surplus energy supplied by Company to Authority shall be paid for on the following basis:

Nonreplacement energy.—The incremental generating cost, or cost of obtaining such energy from third parties, as the case may be, plus losses plus seven (7) percent for handling costs.

Replacement energy.—One-half (½) of the sum of the incremental operating expense of the plant or units from which energy is supplied (which shall include the cost of placing said plant or units in operation, if such cost is incurred) and the incremental operating expense of the plant or units replaced (which shall include the cost which would have been incurred in placing said plant or units in operation, if such cost is avoided).

(*b*) Surplus energy supplied by Authority to Company shall be paid for on the following basis:

Hydro energy.—One-half (½) mill per kilowatt-hour plus one-half (½) of the incremental operating expense of the plant or units replaced (which shall include the cost which would have been incurred in placing said plant or units in operation, if such cost is avoided).

Steam energy.—One-half (½) of the sum of the incremental operating expense of the plant or units from which energy is supplied (which shall include the cost of placing said plant or units in operation, if such cost is incurred) and the incremental operating expense of the plant or units replaced (which shall include the cost which would have been incurred in placing said plant or units in operation, if such cost is avoided).

Equivalent steam energy.—One-half (½) of the sum of the incremental operating expense of the steam plant or steam units capable of generating energy in the amounts and at the rate supplied (which shall include the cost of placing said plant or units in operation, if such cost would have been incurred had such energy been supplied from such plants or units) and the incremental operating expense of the plant or units replaced (which shall include the cost which would have been incurred in placing said plant or units in operation, if such cost is avoided).

For purposes of this subsection (*b*) the term "hydro energy" shall mean energy which the Authority obtains exclusively by generation from excess flows which would otherwise be wasted or from storage waters in anticipation

of flows which in Authority's judgment would be wasted, and the term "equivalent steam energy" shall mean energy which Authority obtains simultaneously with its deliveries to Company either by increasing its receipts of energy from a third party or by temporarily increasing its hydro generation from ponded water which Authority plans to replenish or impound at other hours by increasing its generation at its own fuel plants or its receipts of energy from third parties.

(*c*) Company and Authority shall each provide the other at intervals of not more than six (6) months with a statement based upon the records for the latest periods for which records are available of the incremental operating expense of each of its steam plants and of the cost of placing the respective units of such plants in operation.

[fol. 1308] (*d*) For the purposes of this section, whether or not the cost of placing a plant or units in operation is incurred, or would have been incurred, shall be determined in the judgment of the party controlling said plant or units and the incremental expenses normally incurred as a result of starting and stopping operation of the plant or units shall be used as said cost of placing the plant or units in operation.

Article V

Miscellaneous Provisions

1. *Nominal voltages.*—Except as varied by mutual agreement, the nominal delivery voltages at the interchange points provided for in section 1 of article I of this agreement are specified as follows:

	volts
Pineville Interconnection	69,000
Kentucky Dan Interconnection	69,000
Martin Interconnection	69,000
Fulton Interconnection	69,000
Glasgow Interconnection	69,000

2. *Metering, testing, and inspection.* Each party at its expense shall own, maintain, and operate metering equipment at the respective interchange points specified in section 1 of article I and the delivery points specified in section 1 of Article III of this agreement, at which it owns the substation facilities. Except as otherwise expressly provided in

this agreement all power and energy delivered hereunder shall be accounted for as of the locations of said metering equipment. Each party shall have the right to install and maintain at its expense metering equipment adjacent to any of the meters of the other party as a check on such meters. All of the above-mentioned metering equipment shall be subject to the metering and testing provisions of this section.

The party owning the metering equipment shall at its expense make quarter-yearly tests and inspections of its metering equipment in order to maintain a high standard of accuracy. The owning party shall make additional tests and inspections of its meters if requested by the other party to do so. Either party shall give the other party reasonable advance notice of such tests and inspections of its meters so that its representatives may be present. If any such additional tests or inspections show any meter to be inaccurate by more than two percent (2%) fast or slow, an adjustment in deliveries between the parties shall be made during the following month to adjust for the amounts by which the meters are shown to have been in error for a preceding period of not more than thirty (30) days, and the metering equipment found to be inaccurate or defective shall promptly be repaired, adjusted, or replaced by the owning party. If as a result of a test requested by the nonowning party, the metering equipment shall be found to be accurate within two percent (2%), the nonowning party shall reimburse the owning party upon request for the cost of the testing. Should either party's metering equipment fail at any time to register, the consumption during the period of failure shall be determined from the best information available.

3. *Liability.*—Either party shall save the other party unharmed from any loss, injury, or damage to persons or property arising out of the operation and maintenance of, and transmission of any electric power over, its transmission lines and equipment leading to or from the interchange points and points of delivery herein designated unless such loss, injury, or damage is caused by the sole negligence of the other party, its agents, servants, or employees.

4. *Operation to minimize disturbances.*—The systems of the parties shall be maintained and operated so as to

minimize, in accordance with good practice, the likelihood of disturbance originating in the system of either party causing impairment of the service on the system of the other party or on any other system interconnected with the system of either party.

5. *Service.*—The parties shall supply electricity as agreed upon hereunder, but neither party, its officers, agents, or employees, shall be liable for damages or breach of contract when service is interrupted or suspended by reason of injunction, strike, riot, invasion, fire, accident, floods, backwater caused by floods, act of God, or from any other like causes beyond its control or by reason of necessary maintenance outages. Either party shall notify the other immediately should the service for which the other party is responsible be unsatisfactory for any reason or should there be any difficulties, trouble, or accidents affecting the supply or receipt of electricity. Such notices, if oral, shall be confirmed in writing.

6. *Notice.*—Any notice, demand, or request, required or authorized by this agreement, shall be deemed properly given if mailed postage prepaid to the Manager of Power, Tennessee Valley Authority, Chattanooga, Tenn., in the case of Authority, and to the Vice President, Kentucky Utilities Co., Lexington, Ky., in the case of Company. The designation of the person to be so notified may be changed by Authority or Company at any time or from time to time by similar notice.

7. *Enforcement of rights.*—Either party shall have the right to maintain suit at any time for any loss or claim that may previously have occurred or arisen hereunder without waiting until expiration of the term of this agreement and without losing or waiving any right to maintain suit for subsequent losses occurring during the term of this agreement, and recovery in such suit shall not be deemed as splitting the cause of action.

8. *Waiver.*—Any waiver at any time by either of the parties hereto of its rights with respect to the other party or with respect to any default or matter arising in connection with this agreement shall not be considered a waiver with respect to any subsequent default or matter.

9. *Governmental approvals.*—This agreement is subject to the approval of all governmental authorities having jurisdiction.

10. *Successors of parties.*—This contract shall inure to the benefit of and be binding upon the successors of the respective parties hereto.

11. *Persons not to benefit.*—No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this agreement or to any benefit to arise therefrom. Nothing, however, herein contained in this paragraph shall be construed to extend to any incorporated company if the agreement be for the general benefit of such corporation or company.

12. *Superseded agreements.*—This agreement upon becoming effective shall supersede and cancel the following agreements between Authority ad Company:

TV-48298 (January 11, 1940).
TV-70683 (March 13, 1942).
TV-75502 (September 1, 1942).
TV-80771 (December 1, 1943).
TV-80771, Supplement No. 3 (July 17, 1946).
TB-80771, Supplement No. 4 (May 20, 1947).
TV-80771, Supplement No. 7 (May 11, 1948).
TV-95877 (December 19, 1946).
TV-95877, Supplement No. 1 (January 13, 1947).
TV-96042 (January 8, 1947).
TV-96042, Supplement No. 1 (January 29, 1947).
TV-4025A (August 5, 1948).
TV-7616A (August 25, 1949).

13. *Term.*—This agreement shall become effective as of the date first above written and shall remain in effect for an initial term of ten (10) years and from year to year thereafter until terminated by either party upon at least one (1) year's written notice in advance of the expiration of said initial term of any then current yearly-extension thereof.

In witness whereof, the parties hereto have caused this

instrument to be executed by their duly authorized officers, as of the day and year first above written.

Tennessee Valley Authority, By (S) George F. Gant, General Manager.

Attest:

[Seal]

(S) Leona LeRoy, Assistant Secretary.

Kentucky Utilities Co., (S) E. W. Brown, Vice President.

Attest:

[Seal]

(S) G. M. Kilgus, Assistant Secretary

[fol. 1309] EXHIBIT TV-14190A

Agreement Among Tennessee Valley Authority Powell Valley Electric Cooperative and Kentucky Utilities Company

This Agreement, made and entered into as of the 8th day of October, 1952, by and among Tennessee Valley Authority (hereinafter called "TVA"), a corporation created and existing under and by virtue of the Tennessee Valley Authority Act of 1933 as amended, Powell Valley Electric Cooperative (hereinafter called "Cooperative"), a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Virginia, and Kentucky Utilities Company (hereinafter called "Company"), a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Kentucky;

Witnesseth:

Whereas, Cooperative and TVA have heretofore entered into an agreement in writing dated as of September 8, 1945 (which agreement as supplemented and amended is hereinafter called "Power Contract"), providing for the supply by TVA of Cooperative's electric power and energy requirements up to the maximum therein stated; and

Whereas, Cooperative's loads in the Tazewell, Tennessee, area have grown to such an extent that Cooperative is experiencing difficulty in supplying such loads over its 12.5 kv system from the Fitts Gap substation; and

Whereas, Company desires to establish an additional point of delivery of power in the Tazewell, Tennessee, area to the Company's subsidiary, the Dixie Power and Light Company, which is experiencing similar difficulty in supplying its loads in the Town of Tazewell, Tennessee; and

[fol. 1310] Whereas, the parties hereto now desire to enter into an agreement whereby the aforementioned difficulties may be relieved to their mutual benefit and economy;

Now, Therefore, for and in consideration of the mutual covenants herein contained and subject to the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto covenant and agree as follows:

1. Company shall construct, operate, and maintain at its sole expense, a transmission line from a point on Company's system at Cumberland Gap, Tennessee, to the substation to be constructed, in accordance with Section 2 hereof, on a site to be selected by representatives of the parties hereto and acquired by the Cooperative at its sole expense, at or near the Town of Tazewell, Tennessee.

2. Cooperative shall with due diligence construct, or cause to be constructed, and shall thereafter own, operate and maintain at its sole expense on the site to be acquired by it in accordance with Section 1 hereof, a substation of not less than 5,000 kva capacity with sufficient space therein for the ultimate installation of eight (8) 15 kv oil circuit breakers. The equipment to be installed in said substation by Cooperative shall include, without limitation by reason of specification, a 5,000 kva, or larger transformer bank suitable for 33 or 66 kv operation with a low tension rating of 7.2/12.45 kv wye; a 500 kva, or larger, 12.47 kv, plus or minus 10% voltage regulator with parallel winding for double capacity at plus or minus 5% regulation; such 15 kv oil cureuit breakers as from time to time may be required by Cooperative for its use; one 15 kv oil circuit breaker for the Company's use; and a 60 minute interval recording demand and watthour meter which will register all power and energy taken by Cooperative at the low-tension side of said substation. The substation to be constructed pursuant to this section is hereinafter called "Tazewell Substation."

[fol. 1311] 3. Cooperative shall reserve for Company's use 1,500 kva of Tazewell Substation's capacity, and Company shall install, or cause to be installed, and shall thereafter operate and maintain at its sole expense in Tazewell Substation a 60 minute interval recording demand and watthour meter which will register all power and energy taken by Company at the low-tension side of said substation. Company shall make records from said meter available to Cooperative and/or TVA upon request. Cooperative hereby grants Company such rights in and on Cooperative's property as may be necessary for the use, installation, operation, and maintenance of the aforementioned metering equipment.

4. (a) Section 1 of Article III of an agreement dated

as of March 22, 1951, between TVA and Company, which agreement is designated in TVA's files as Contract TV-11505A, is amended, effective with the date of initial delivery of power by Company to TVA at Tazewell Substation, by adding to the tabulation there set out, the following:

Delivery Point	Maximum Demand	Present Delivery Voltage	Future Delivery Voltage
High side of Powell Valley Electric Cooperative's Tazewell Substation	1,500 kva	33,000	66,000

(b) Deliveries of power and energy to TVA at the point established in Section 4(a) hereof shall be made in accordance with the provisions of Articles III and V of said Contract TV-11505A.

5. (a) Cooperative shall permit TVA to make such tests of Cooperative's meter at Tazewell Substation as is deemed necessary or desirable in TVA's judgment. In the event such tests prove the meter is inaccurate by more than 2% fast or slow, TVA shall have the right to [fol. 1312] make such adjustments as may be necessary to bring the accuracy of the meter within the above limits. If such adjustments fail to improve the accuracy of the meter to such extent, Cooperative shall replace said meter. All readings and charts from said meter shall be TVA's property and TVA shall read said meter each month and shall furnish charts for said meter as required.

(b) Power and energy supplied by TVA to Cooperative through the system of Company as provided herein shall be delivered, taken and paid for in accordance with and subject to all the terms and provisions of the Power Contract except as expressly provided herein. For purposes of billing under the Power Contract the power and energy so delivered to Cooperative shall be the amount registered on Cooperative's meter at Tazewell Substation plus the portion of transformer losses caused by Cooperative's load to said substation and these amounts shall be added on a simultaneous basis to the measurements of power and energy delivered to Cooperative by TVA at the Fitts Gap Substation.

6. This agreement shall be effective as of the date first above written and shall remain in effect until the expiration of said Contract TV-11505A.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective officers thereunto duly authorized, as of the day and year first above written.

Attest:

/s/ O. C. Albert,
——, ——.

Powell Valley Electric Cooperative.
By /s/ C. M. Collins,
President

[fol. 1313] Attest:

/s/ G. M. Kilgus,
Assistant Secretary.

Kentucky Utilities Company.
By /s/ E. W. Brown,
Vice President

Attest:

/s/ Leona LeRoy,
Assistant Secretary.

Tennessee Valley Authority.
By /s/ John Olinn,
General Manager.

Law

Approved by TVA Board of Directors December 19, 1952.

L.L.
Assistant Secretary.

POWELL VALLEY ELECTRIC COOPERATIVE

August 22, 1952

Mr. E. W. Brown, Vice President
Kentucky Utilities Company
159 West Main Street
Lexington 3, Kentucky

Dear Mr. Brown:

This will acknowledge receipt of your letter of July 14 with which you transmitted executed copies of the agreement providing for a delivery point to the Cooperative at Tazewell, Tennessee, on behalf of TVA.

The terms of the agreement and your letter were discussed at a meeting of our Board of Directors on August 13 and are acceptable with the exception of a few points which we feel need clarification in the understanding with respect to service territory.

We understand the third paragraph of your letter as a statement of policy designed to avoid controversy with respect to the customers in Tennessee served by our respective systems. It appears to us that this meaning might be clarified somewhat by a rearrangement of this sentence and we would like to suggest the following: "We are agreed that during the term of this agreement neither Powell Valley Electric Cooperative nor the Dixie Power & Light Company will serve any customer who is receiving service from the other party."

If this statement also satisfactorily expresses your desires, we would appreciate very much your acknowledgement by the return of one copy of this letter in order that [fol. 1314] we may feel free to execute the tri-party agreement and forward it to TVA for completion.

Very truly yours, /s/ Davis L. McNiel, Manager,
Powell Valley Electric Cooperative.

Accepted:

Kentucky Utilities Company for Dixie Power & Light Company.

by /s/ E. W. Brown.

[fol. 1315] TV-22721A

Agreement Among Tennessee Valley Authority Powell Valley Electric Cooperative Old Dominion Power Company and Kentucky Utilities Company

This Agreement, made and entered into as of the 22 day of June, 1961, by and among the Tennessee Valley Authority (hereinafter called "TVA"), a corporation created and existing under and by virtue of the Tennessee Valley Authority Act of 1933, as amended, Powell Valley Electric Cooperative (hereinafter called "Cooperative"), Old Dominion Power Company (hereinafter called "Old Dominion"), a subsidiary of Kentucky Utilities Company, both Cooperative and Old Dominion being corporations duly created, organized, and existing under and by virtue of the laws of the Commonwealth of Virginia, and Kentucky Utilities Company (hereinafter called "Company"), a corporation duly created, organized, and existing under and by virtue of the laws of the Commonwealth of Kentucky;

Witnesseth:

Whereas, Cooperative, TVA, and Company have heretofore entered into an agreement dated October 8, 1952 (TV-14190A), which agreement supplements and amends the Interconnection Agreement of March 22, 1951 (TV-11505A), between Company and TVA (which agreement as amended and supplemented is hereinafter called "Interconnection Agreement"), providing for the construction, operation, and maintenance by Cooperative of its Tazewell Substation with a capacity of not less than 5,000 kva to facilitate the [fol. 1316] supply of power to Cooperative in the area and also providing that 1,500 kva to said capacity shall be reserved by Cooperative for Company's use; and

Whereas, the loads of both Cooperative and Company in the Tazewell, Tennessee, area have grown so that it is desirable to increase the power Cooperative receives at the Tazewell Substation and also to increase the capacity of the Tazewell Substation and the amount of said capacity reserved for Company's use; and

Whereas, Cooperative, TVA, Company, and Old Dominion have heretofore entered into an agreement dated January 21, 1952 (TV-12890A), providing for the supply of power by Company to Cooperative's Stone Creek Substation for TVA's account and for the supply of power by TVA over Cooperative's lines to Old Dominion's Jonesville Substation for Company's account; and

Whereas, the parties desire to increase the amount of power which Company makes available to Cooperative at the Stone Creek Substation, discontinue the supply of power by TVA to said Jonesville Substation, and establish an emergency interchange connection near Jonesville between the systems of Old Dominion and Cooperative;

Now, Therefore, for and in consideration of the mutual covenants herein contained and subject to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the parties hereto covenant and agree as follows:

1. (a) Cooperative shall, when necessary and at its sole expense, increase the transformer capacity of its Tazewell Substation provided for in Section 2 of Agreement TV-14190A to an amount sufficient to transform the power provided for in subsections (b) and (c) next following.

[fol. 1317] (b) Section 3 of Agreement TV-14190A is hereby amended by striking the figures and symbol "1,500 kva" appearing therein and substituting in lieu thereof the figures and symbol "3,000 kva."

(c) The portion of the tabulation appearing in Section 1 of Article III of the Interconnection Agreement referring to the delivery point at Cooperative's Tazewell Substation, which delivery point was added to said tabulation by Section 4(a) of said Agreement TV-14190A, is hereby amended by striking the figures and symbol "1,500 kva" appearing under the heading of "Maximum Demand" and substituting in lieu thereof the figures and symbol "8,000 kva."

2. The tabulation appearing in Section 1 of Article III of the Interconnection Agreement is hereby further amended by adding thereto the following:

High side of Powell Valley Electric Cooperative's Stone Creek Substation.....	1,000 kva	33,000	33,000

Deliveries of power and energy by Company at the Stone Creek Substation delivery point for TVA's account shall be made in accordance with the provisions as amended of Articles III and V of the Interconnection Agreement.

3. Old Dominion and Cooperative will continue to maintain their own facilities at the Stone Creek Substation delivery point, including the operation and maintenance by Old Dominion at its expense of a recording demand and watthour meter suitable for determining the 60-minute interval demand on the 12.5-kv side of said substation. Old Dominion's meter shall be read on the same date each month as TVA reads its meter at the Fitts Gap Substation. Company agrees to make available to TVA immediately after said date each month the readings of and the charts removed from said meters at said substation.

[fol. 1318] 4. Power and energy supplied by TVA to Cooperative through the system of Company as provided herein shall be delivered, taken and paid for in accordance with and subject to all the terms and provisions of the agreement between TVA and Cooperative date as of September 8, 1945 (which agreement as supplemented and amended is hereinafter called "Power Contract"), except as expressly provided herein. For purposes of billing under the Power Contract the power and energy so delivered to Cooperative shall be the amounts registered on Old Dominion's meter at the Stone Creek Substation plus an adjustment for transformer losses, and these amounts shall be added on a simultaneous basis of the measurements of power and energy delivered to Cooperative by TVA at the Fitts Gap Substation.

5. This agreement shall terminate and supersede Agreement TV-12890A, dated January 21, 1952, among the parties hereto.

6. The parties shall proceed with due diligence to establish an emergency interchange point between Cooperative's and Old Dominion's 12.5-kv systems at the location near Jonesville at which Old Dominion's Jonesville Substation was connected to Cooperative's system under said Agreement TV-12890A. Old Dominion shall make all necessary changes in its facilities at its sole expense to enable Old Dominion to connect its lines to Cooperative's lines at said location for

such emergency and other interchange purposes, and Cooperative shall make its facilities available to TVA without expense for the purpose of transmitting such emergency power to and from the Jonesville interconnection point. Cooperative will leave in place its existing metering equipment at said point of interconnection and Old Dominion shall be responsible for operating and maintaining said equipment at its expense.

It is the intent of the parties that the emergency conditions under which one party is entitled to call for emergency assistance and the other party is obligated, to the extent here- [fol. 1319] inafter provided, to supply emergency assistance at this interconnection point, are conditions arising from temporary circumstances, resulting in the unavailability of normally available facilities, which are beyond the control of the party affected and which prevent or interfere with or jeopardize the rendering of adequate and satisfactory service in the system of the party calling for emergency assistance.

Company shall, upon request by TVA during emergency conditions on the system of TVA or Cooperative, supply up to 700 kw of power to TVA at the Jonesville interconnection point if in the judgment of Company it has capacity in excess of its prior commitments available to deliver such power. TVA shall, upon request of Company during emergency conditions on Company's or Old Dominion's system, supply up to 700 kw of power to Company at the Jonesville interconnection point if in the judgment of TVA and Cooperative they have capacity in excess of their prior commitments available to deliver such power to the Jonesville interconnection point.

It is further the intent of the parties that other interchange transactions may take place at the Jonesville interconnection from time to time under conditions agreed to by the operating representatives of the parties hereto at the time.

The Jonesville interconnection shall remain open except when power is interchanged as provided herein, and during such periods of interchange the portion of the system of the receiving party being supplied with power hereunder shall be disconnected from its normal source of supply. Power supplied to Company by TVA pursuant to this Sec-

tion will be treated as power delivered in accordance with Section 2 of Article III of the Interconnection Agreement. Power supplied by Company to TVA pursuant to this Section will be treated as power delivered under Section 1 of Article III of the Interconnection Agreement.

W030861

[fol. 1320] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 7 to deposition of C. Wilson House

March 13, 1962.

Mr. F. E. Berry, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Red:

This is to confirm our telephone conversation this morning.

Paul Button and I, and a representative of our Division of Law, will plan to meet you and representatives of Tazewell and New Tazewell on Thursday, April 12, at 1:00 p.m. I understand you will advise me next week the place in Tazewell or New Tazewell the meeting will be held.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

CWH:VGL

CC: Paul S. Button, 815 PRB, Chattanooga

3/16/62—Mr. Button said in connection with Tazewell's request for power—IC/mp/rd

[fol. 1321]

Mgrs File
April 6, 1962.

Mr. F. E. Berry, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Red:

This is to confirm our recent telephone conversation relative to our meeting.

Paul Button, C. A. Reidinger, and I will meet you, other representatives of your cooperative, and representatives of the city governing boards of Tazewell and New Tazewell at the Cedar Grove Cabins on State Highway No. 33 about five miles southwest of New Tazewell on Thursday, April 12 at 1 p.m.

We are looking forward to seeing you next week.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

CWH:PR

CC: Paul S. Button, 809 PRB, Chattanooga
C. A. Reidinger, 619 NSB, Knoxville

[fol. 1322] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 8 to deposition of C. Wilson House

POWELL VALLEY ELECTRIC COOPERATIVE
REA
Jonesville, Virginia

Cooperative
Electricity
F. E. Berry
Manager

Telephone
Jonesville 52

April 13, 1962.

Mr. C. Wilson House
District Manager
Tennessee Valley Authority
26 UAB
Knoxville, Tennessee

Dear Wilson:

I am enclosing herewith a [attached] list of those persons attending our meeting yesterday at New Tazewell, and I wish to take this opportunity to thank you and your associates for your time given these people on various occasions.

Please convey my thanks to Paul and C. A. as their discussion of these problems was very informative to me as well as the citizens of these two towns.

Very truly yours, F. E. Berry, Manager, Powell Valley Electric Cooperative.

FEB:mrr

[fol. 1323] List of Persons Attending Power Meeting at Cedar Grove New Tazewell, Tennessee, on April 12, 1962

J. M. Campbell	Pres., Claiborne County Chamber of Commerce—New Tazewell
Glen McCallough	Councilman—New Tazewell, Tennessee
E. J. Hardin, III	Councilman—Tazewell, Tennessee
Douglas Overton	Recorder—Tazewell, Tennessee
C. A. Reidinger	TVA—Knoxville, Tennessee
Paul S. Button	TVA—Chattanooga, Tennessee
C. Wilson House	TVA—Knoxville, Tennessee
Rome Cardwell	Councilman—Tazewell, Tennessee
Joe F. Essary	Mayor—Tazewell, Tennessee
Ray Neely	Councilman—Tazewell, Tennessee
Edward M. Duncan	Councilman—New Tazewell, Tennessee
Lloyd Moyers	Planning Committee—Tazewell, Tennessee
Wm. R. Stanifer	Attorney for Cities and Chamber of Commerce—Tazewell
Harry B. Rowe	PVEC—New Tazewell, Tennessee
F. E. Berry	Manager, PVEC—Jonesville, Virginia
Bill Debusk	Mayor—New Tazewell, Tennessee
Reed Bailey	New Tazewell Merchants Association —New Tazewell
Ralph Miner	PVEC—Jonesville, Virginia
Paris Coffey	Councilman—New Tazewell, Tennessee

[fol. 1324] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 9 to deposition of C. Wilson House

EXHIBIT No. 71

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

To: Manager's Files, 531 PRB, Chattanooga
From: C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
Date: April 18, 1962
Subject: Meeting With Representatives of Tazewell and New Tazewell

The city councils of Tazewell and New Tazewell requested that representatives of TVA meet with them to discuss the possibility of obtaining TVA power. Messrs. Paul S. Button, C. A. Reidinger, and the writer met with their representatives at Cedar Grove, New Tazewell, on April 12, 1962. Thirteen representatives from Tazewell, New Tazewell, and Claiborne County were present. Mr. F. E. Berry, Manager, and two other representatives of Powell Valley Electric Cooperative, were also present. Attached is copy of [attached] letter dated April 13 from Mr. Berry with [attached 4-13-62] list of those attending meeting.

Representatives of the two towns said their governing boards and citizens were very anxious to get lower cost power and were going to do everything possible to obtain it. Both towns are incorporated but do not have any city taxes. The water system is jointly owned and operated but does not serve all persons inside the city limits.

The group was advised by TVA representatives that TVA would furnish power to the people in the towns if the towns or Powell Valley Electric Cooperative purchased or constructed a distribution system, provided it was economically feasible. They were advised that due to the relative small number of customers and load, it was probable that the only economical way they could be served with TVA power was

by the Cooperative. They were further advised that due to the territorial agreement between the cooperative and Kentucky Utilities, and the tri-party agreement among the cooperative, Kentucky Utilities, and TVA covering Tazewell Substation there is some doubt that the cooperative could serve them initially.

Mr. Berry said even if the above agreements should not prevent the cooperative giving service, he doubted seriously if REA would loan them funds or allow them to use their own funds to build a competing system with the probability of litigation from Kentucky Utilities. Mr. Berry said in the event the towns built their own distribution system, he felt sure the cooperative would be willing to enter into a contract to operate and maintain it.

[fol. 1325] TVA representatives suggested that each of the towns appoint three representatives on a committee to further study the situation and determine what actions should be taken. It was suggested that this committee of six might want to contact Kentucky Utilities to determine if they would be willing to sell the distribution system to the towns or cooperative, and possibly employ an engineering firm to make a study. Any commitments made by the committee would have to have prior approval of the governing boards of the two towns. The group was advised that both TVA and the cooperative would be glad to confer with the committee at any time.

C. Wilson House.

CWH:VGL

Attachment:

CC: Paul S. Button, 815 PRB, Chattanooga
C. A. Reidinger, 619 NSB, Knoxville
James E. Watson, 818 PRB, Chattanooga

P. S. F. E. Berry died suddenly of a heart attack the night after this meeting. Ralph Miner, who was present at the meeting, has been appointed Acting Manager.

[fol. 1326] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 10 to deposition of C. Wilson House

EXHIBIT No. 72

Paul S. Button, Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
October 17, 1962

Powell Valley Electric Cooperative—Tazewell and New Tazewell

Ralph Miner, Manager of Powell Valley Electric Cooperative, advised me today that they sent a registered letter to the Kentucky Utilities Company yesterday (October 16, 1962) giving notice of cancellation of territorial agreement on January 16, 1963. You have a copy of this letter agreement which was [filed 332.53 Powell Valley EC] letter dated January 8, 1958, from KU to the cooperative, and accepted and agreed to by the cooperative on January 16, 1958.

Attached for your information is copy of [attached] letter dated October 5, 1962, to Mr. Kivett, Attorney in Tazewell from the Tennessee Public Service Commission, and [attached] letter dated October 8, 1962, to the cooperative from Mr. Kivett, relative to service to a residence in New Tazewell.

C. Wilson House.

CWH:VGL

Attachments

CC: C. J. McCarthy, 609 NSB, Knoxville

[fol. 1327] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 11 to deposition of C. Wilson House

EXHIBIT No. 73

Paul S. Button, Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
October 18, 1962

Powell Valley Electric Cooperative—Service to Housing Projects—Tazewell and New Tazewell

A 24-unit housing project is being constructed in Tazewell and a 36-unit project in New Tazewell. The projects are being constructed by the LaFollette Housing Authority. The Authority is very anxious to obtain electric service from the Powell Valley Electric Cooperative rather than the Kentucky Utilities in order that these low-rent houses can be heated electrically.

Attached is copy of [attached] letter dated October 17, 1962, from Ralph B. Miner, Manager of the cooperative, (with copies of his attached relative information) requesting a meeting with TVA representatives to discuss this matter.

Under the territorial agreement between the cooperative and KU, effective January 16, 1958, [filed 332.53 Powell Valley EC] both of these projects are in KU's territory. As I advised you yesterday, the cooperative has notified KU of termination of this letter agreement on January 16, 1963.

KU is furnishing construction power for these projects but I understand service is in the name of the contractor and not the Housing Authority. Ralph Miner advises me that he understands the Authority has advised KU by letter that they do not want service from them. He is going to endeavor to get a copy of this letter.

As you know, the letter agreement [filed 332.53 Powell Valley EC] dated August 22, 1952, between the cooperative and KU only stipulates that during the term of the tri-party agreement neither the cooperative nor KU will serve any customer who is receiving service from the other party.

It will be appreciated if you will advise me a date representatives of Power Marketing and Division of Law can meet with Mr. Miner and his attorney in Knoxville to discuss this problem and possibly other matters concerning possible service to Tazewell and New Tazewell.

C. Wilson House.

CWH:VGL

Attachments—6

CC: C. J. McCarthy, 609 NSB, Knoxville

[fol. 1328] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 12 to deposition of C. Wilson House

Mgrs File
October 31, 1962.

Mr. Ralph B. Miner
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

I have made arrangements for C. A. Reidinger of our Division of Law and Paul S. Button, Director of Power Marketing, to meet you and your attorney in my office on Thursday, November 15 at 10:30 a.m.

We are looking forward to seeing you.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

CWH:PR

CC: Paul S. Button, 815 PRB, Chattanooga
C. A. Reidinger, 619 NSB, Knoxville

[fol. 1329]

Mgr. File

POWELL VALLEY ELECTRIC COOPERATIVE
REA
Jonesville, Virginia

Cooperative
Electricity
Ralph B. Miner
Manager

Telephone
Jonesville 52

November 2, 1962.

Mr. C. Wilson House
District Manager
Tennessee Valley Authority
26 UAB
Knoxville, Tennessee

Dear Wilson:

Thank you for making arrangements for the meeting on November 15 at 10:30 A. M.

We will see you then.

Very truly yours, Ralph B. Miner, Manager, Powell Valley Electric Cooperative.

RBM:mrr

[fol. 1330] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 13 to deposition of C. Wilson House

EXHIBIT No. 74

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum
To: Manager's Files, 531 PRB, Chattanooga
From: C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
Date: November 19, 1962
Subject: Meeting With Powell Valley Electric Cooperative —Relative to Tazewell and New Tazewell

Messrs. T. Graham Wells, Jr., C. A. Reidinger, and the writer met with Ralph B. Miner, Manager, and Clyde K. Cridlin, Attorney, of the Powell Valley Electric Cooperative, in the writer's office on November 15, 1962. The purpose of the meeting was to discuss the possibility of Tazewell and New Tazewell obtaining TVA power and what action should be taken at this time. Mr. Miner said the people and city councils of the two cities are very anxious to obtain TVA power.

Mr. Miner said, while in Washington recently, REA had advised him that REA could not grant a loan to the cooperative to serve the two cities but the cooperative could use its general fund.

TVA representatives advised the cooperative that a decision should be made as to whether the cooperative or the two cities will undertake to purchase Kentucky Utilities' facilities and, if that fails, to build a competing system. The letter agreement [filed 332.53 Powell Valley EC 8-22-52] between the cooperative and Kentucky Utilities, which is still in effect and is a part of tri-party agreement, might cause some difficulty if cooperative should start a competing system.

Regardless of who plans to initially serve the area, it was recommended that an engineering firm be employed to make an evaluation of the KU properties. It was agreed that

probably the area to be considered would be that area now served by KU out of the Tazewell Substation, which includes Tazewell, New Tazewell, and some rural customers in the vicinity and on Highway 25E as far northwest as the Powell River. It was suggested by TVA representatives that, first, an offer should be made to KU for the purchase of facilities and customers, and if KU refuses to sell, then start building a duplicate system at once.

It was pointed out that if the cities plan to serve the area initially, they would need to have their financing arrangement made, and an agreement with the cooperative providing for the operation of the system.

[fol. 1331] We suggested that the cooperative's attorney become familiar with cooperative laws in Tennessee and also determine the best method for the cooperative to purchase the system from the cities if it is initially acquired or constructed by the cities. He should also determine if it would be possible and feasible for the cooperative to purchase cities' revenue bonds.

In connection with Hammond Fowler's [attached] letter dated October 5, 1962, to Mr. Kivell, an attorney in Tazewell, Mr. Reidinger recommended that the cooperative and the two cities should request a hearing before the Tennessee Public Service Commission on any territory boundary which might be applied for by KU. He further suggested that the two cities pass resolutions that it is to the public interest for the cities to either purchase KU facilities or build a competing system; the Public Service Commission should be requested to deny KU a certificate of convenience and necessity, and should order KU to either reduce its rates to the level of the cooperative rates or sell its facilities to the cooperative in the public interest.

TVA representatives told Mr. Miner that a meeting with two or three representatives from each of the two city councils (Tazewell and New Tazewell) would be preferred to a meeting with the Claiborne County Chamber of Commerce as requested. He will make arrangements for this meeting to be held in writer's office on Tuesday, November 27, at 1:30 p.m.

The cooperative representatives requested that TVA advise them if TVA will provide a delivery point to the coop-

erative (and also to the cities if necessary) in the vicinity of Tazewell in the event KU is not willing to continue to deliver power to Tazewell on an interchange basis.

C. Wilson House.

CWH:VGL

CC: Paul S. Button, 815 PRB, Chattanooga
C. J. McCarthy, 609 NSB, Knoxville

[fol. 1332] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 14 to deposition of C. Wilson House

November 16, 1962.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

Graham Wells, C. A. Reidinger, and I enjoyed our meeting with you and Mr. Clyde Cridlin yesterday.

Confirming our telephone conversation this morning, we will plan to meet you and Mr. Cridlin in my office on Tuesday, November 27, 1962, at 9:30 a.m. (instead of 10:30 a.m. as originally scheduled).

I understand that you will make arrangements with Mr. Johnson Crawford of the New Jersey Zinc Company to meet with us at 11 a.m. (on November 27) to discuss the possibility of reducing the contract demand in the industrial power contract providing for service to the company's mine at Flat Gap.

You will also make arrangements with two or three representatives from the city council of both Tazewell and New Tazewell to meet with us on the same day at 1:30 p.m.

If anything should come up to interfer with our proposed meeting on November 27, please advise me. I will do likewise.

Very truly yours, Tennessee Valley Authority,
C. Wilson House, District Manager, Office of Power.

CWH:VGL

CC: Paul S. Button, 815 PRB, Chattanooga
C. J. McCarthy, 609 NSB, Knoxville

[fol. 1333] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 15 to deposition of C. Wilson House

EXHIBIT No. 75

INFORMAL

November 20, 1962.

T. Graham Wells
813 PRB

Please prepare a brief summary for use in discussing the problem of serving Tazewell and New Tazewell with the TVA Board.

The outline should include reference to previous overtures by these towns and advice given them. It should include certain basic facts, such as legal status of these towns under amended TVA Act, number of customers in each town, approximate power use and demands, and an estimate of system replacement cost.

The summary should include status of delivery point arrangements with KU, as well as territorial agreements.

The summary should include estimated cost of providing a delivery point from the TVA system for serving these loads. A mention of the alternative solutions would be appropriate.

The above should be developed, edited, and completed in time for review between us on November 26, since the discussion is scheduled with the TVA Board on the morning of November 27.

Paul S. Button.

PSB:BMR

[fol. 1334]

531 PRB

Paul S. Button, Director of Power Marketing, 815 PRB
K. E. Hapgood, Director of Power Planning and Engineering, 521 PRB
November 23, 1962
Service to Tazewell, Tennessee

Service to Tazewell could be provided by the construction of a 69 kv transmission line from the proposed Speedwell, Tennessee, Substation to Tazewell at a cost of the order of $500,000. For service to only the Tazewell load a 5000 kva, 69-13 kv substation could be installed at a cost of some $175,000.

If service were to also be provided to Powell Valley EC at Tazewell, we would probably construct a 20 mva, 69-26 kv substation to supply the Powell Valley EC's loads because they have plans to convert their system in this area to 25 kv. The cost of this substation with one 26 kv ocb would probably be some $275,000. Assuming that service to Tazewell would be provided at 13 kv it would be necessary to install a 5000 kva, 26/13 kv transformer bank with a 26 kv breaker at a cost of some $75,000. For TVA's purposes no breaker would be required on the 13 kv side. However, if Tazewell were to request breakers for the termination of more than one 12.5 kv circuit then TVA may consider installing one of these breakers at its expense. 13 kv breakers could cost $18,000 to $20,000 each.

These estimates are not based on any detailed studies and are subject to refinements but they may be adequate for your purposes and are certainly the best we can do on a day's notice. It is believed that detailed studies may indicate the most economical plan to supply Tazewell and Powell Valley would be for TVA to construct a 15 mva, 69-26 kv substation as an expansion of the present substation, if property is available to do this, to supply Powell Valley at 26 kv and TVA purchase the present Powell Valley 33/66-13 kv, 5000 kva substation from Powell Valley and use it to supply Tazewell.

FC:EP

KEH.

[fol. 1335] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 16 to deposition of C. Wilson House

EXHIBIT No. 76

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum
To: Maanger's Files, 531 PRB, Chattanooga
From: C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
Date: November 28, 1962
Subject: Meeting With Representatives of Powell Valley Electric Cooperative and Cities of Tazewell and New Tazewell

A meeting was held in the writer's office on November 27, 1962, at the request of the cities of Tazewell and New Tazewell to discuss what action the cities should take in their endeavor to obtain low cost electric power. The following were present:

Joe F. Essary	Mayor of Tazewell
Bill DeBusk	Mayor of New Tazewell
William R. Stanifer	Attorney for Tazewell and New Tazewell, and Secretary of Claiborne County Chamber of Commerce
Paris Coffey	Representative Claiborne County Chamber of Commerce
Dr. William Smith	Representative Claiborne County Chamber of Commerce
Ralph B. Miner	Manager, Powell Valley EC
Clyde Y. Cridlin	Attorney, Powell Valley EC
Paul S. Button	TVA
Edgar H. Drum	TVA
C. Wilson House	TVA

Mr. Miner said he had discussed this matter with his board and they believe the two cities, instead of the cooperative, should take the necessary steps to purchase KU properties or build a competing system in Tazewell and New Tazewell. This decision was based on REA's and the cooperative's thought that it might be detrimental to the REA program to build a duplicate system. (Another reason, which was not mentioned to the cities' representatives, is territorial letter [filed 332.53 Powell Valley EC] agreement dated August 22, 1952.)

The two mayors stated that their city councils and a large percent of their citizens are very anxious to obtain low-cost electric service (rates equal to the cooperative's rates) and that the city councils are willing and anxious to do anything feasible to accomplish the desired results.

[fol. 1336] After considerable discussion of the problems involved and possible actions which could be taken, it was decided by the cities and cooperative that the following should be the initial steps:

1. The two cities will pass a joint resolution to the effect that they are going to endeavor to obtain low cost power for their citizens. The resolution to be specific on their intent but not too specific on how it will be accomplished. Mr. Stanifer, Attorney for the two cities, is to prepare a suggested resolution and send it to Mr. Cridlin for his comments. Mr. Cridlin will send it to TVA for comments. After all comments are received, the two cities will pass the resolution.
2. Each of the two cities will appoint a committee of two councilmen and the mayor. The Claiborne County Chamber of Commerce will probably have two representatives on this committee.
3. Mr. Stanifer and Mr. Essary, Mayor of Tazewell, plan to be in Nashville on November 30, and will endeavor to talk to representatives of the Tennessee Public Service Commission and get suggestions from them.
4. The cities will employ a consulting engineer to make an appraisal of KU facilities and customers served from the Tazewell Substation and also an estimate of cost to construct a duplicating system. Mr. Miner is to make arangements for a meeting between R. H. Cot-

trell and the cities' committee to discuss the proposed study.

5. Mr. Miner will make an estimate of cost for the cooperative to operate and maintain the electric system in the event it is acquired or constructed by the cities. (I understand this cost will be based on an increment basis.)
6. After items 4 and 5 above are completed and reviewed, representatives of the cities, cooperative, and TVA will have another meeting to discuss the matter further and decide upon the next step or steps to be taken.

[fol. 1337] TVA representatives advised the group that TVA is not promoting this project; however if the cities and cooperative think it is to their interest to obtain TVA power for Tazewell and New Tazewell and plan to take such action as is necessary to accomplish this, TVA will cooperate with them. They were further advised that in matters of this kind there is always the probability of injunctions and court actions to delay their plans. Mr. Button urged the cities and cooperative to make their plans flexible enough so that either the cities or cooperative could serve the cities initially.

Mr. Button assured the cooperative representatives that TVA will continue to furnish the power supply requirements of the cooperative in the Tazewell area.

C. Wilson House.

CWH:VGL

Attachments

CC: Paul S. Button, 815 PRB, Chattanooga
C. J. McCarthy, 609 NSB, Knoxville
T. Graham Wells, Jr., 813 PRB, Chattanooga

P.S. Attached are copies of the following which were given to the writer at the meeting:

Letter dated November 1, 1962, from Hammond Fowler to Rogers Kivett
Notes by cooperative on meeting with REA on November 6, 1962
Notes by cooperative on meeting with TVA on November 15, 1962

[fol. 1338] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 17 to deposition of C. Wilson House

EXHIBIT No. 77

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

To: Manager's Files
From: Paul S. Button, Director of Power Marketing, 815 PRB
Date: December 5, 1962
Subject: Service to Powell Valley Electric Cooperative in the Tazewell, Tennessee, Area

On November 27, 1962, there was a discussion with the TVA Board on recent developments relating to the efforts of the people of Tazewell and New Tazewell, Tennessee, to obtain TVA power.

It was noted that early in 1960, representatives of these towns met with the TVA Board to discuss the possibility of getting TVA power. At that time they were told that we did not consider them to be outside the area in which TVA power could be supplied, but because of their size we doubted whether they would have a feasible operation. The possibility of being served by the cooperative in the area was being considered by the towns.

Within the past year, at the cities' request, there have been several meetings among representatives of the cities, the cooperative, and TVA concerning aspects of this matter. Recently, the cooperative has given notice of termination to the Kentucky Utilities Company of a territorial [filed 332.53 Powell Valley EC 8-22-52] agreement between them. This agreement would have precluded further service by the cooperative in the town. REA has informed the cooperative that provided continued power supply is assured at Tazewell, they would not object to the cooperative's use of general funds for the financing necessary to provide service to these towns.

The cities have not renewed the company's franchises and are planning to appeal to the Tennessee Public Service Commission for rate relief or offer to buy the company's facilities serving them. They contemplate ultimate service through the cooperative. Initially, it may develop that distribution-system financing may take the form of a lease-purchase-operation arrangement with the cooperative.

The power for this area now comes from the Kentucky Utilities system. Under a tri-party agreement, [TV-12890A, filed 332.53 Powell Valley EC—Cont.] TVA delivers power to the company at our major interchange points in return for delivery by the company to the cooperative for our account at cooperative's substation in Tazewell. Part of the capacity of this substation is reserved for the company to serve about 1200 kw of load in these towns. The cooperative now serves about 4900 kw from this substation. Most of this load is in the area surrounding the towns.

[fol. 1339] It is apparent that if the cities are successful in their efforts to transfer their source of power to the cooperative, the company will have little interest in either continuing or expanding the transmission facilities serving this area. In view of this fact, the cooperative has asked if TVA would give them assurance of a supply of power at this location even if the present interchange arrangements are discontinued.

During the discussion, we pointed out that under the tri-party arrangement TVA established a delivery point for the cooperative at this location, but the cooperative provided the transformation facilities during the development of new loads in this area and TVA was able to delay investment normally related to this service. Even if the cities' loads were not added to the cooperative's system, other growth would soon require increased substation capacity and system strengthening. In either event, we would seek to take care of the growth as economically as possible, but if interchange was no longer available the development of our system in this area would entail extending a presently approved 69-kv line from LaFollette to Speedwell on up to Tazewell. This line and the terminal facilities might require additional investment of as much as $500,000 or even $750,000. These amounts, however, would provide strengthening in an area where there is need for economic

growth and the facilities would provide for a number of years in the future.

In view of the above, we recommended that TVA should assure the Powell Valley Electric Cooperative TVA would continue to supply their power requirements in the vicinity of Tazewell, Tennessee.

PSB.

PSB:BMR

CC: Paul L. Evans, 324 NSB, Knoxville
C. Wilson House, 26 UAB, Knoxville
Charles J. McCarthy, 629 NSB, Knoxville
E. A. Shelley, 411 NSB, Knoxville
J. E. Watson, 818 PRB
G. O. Wessenauer, 818 PRB
L. J. Van Mol, 411 NSB, Knoxville (4)

[fol. 1340] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 18 to deposition of C. Wilson House

EXHIBIT No. 78

UNITED STATES GOVERNMENT
Tennessee Valley Authority

Memorandum

12-11-62—Copies to: JEW, TGW, CWH—Mgr's F.
To: Mr. G. O. Wessenauer, Manager of Power, 818 PRB, Chattanooga (3)
From: L. J. Van Mol, General Manager, 411 NSB, Knoxville
Date: December 10, 1962
Subject: Service to Powell Valley Electric Cooperative in The Tazewell, Tennessee, Area

On November 27, 1962, following the discussion of the above subject, including the status of efforts by Tazewell and New Tazewell to obtain more economical power, the TVA Board approved the recommendation of the Office of Power that the Powell Valley Electric Cooperative be advised that TVA will continue to provide their future power requirements in the vicinity of Tazewell, Tennessee. The Board considered TVA's responsibility to continue serving the power requirements of the cooperative at this location as well as the need and urgency to encourage economic growth in this part of the region.

L. J. Van Mol.

CC: Paul L. Evans, 324 NSB
Charles J. McCarthy, 629 NSB
E. A. Shelley, 411 NSB

[fol. 1341] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 19 to deposition of C. Wilson House

EXHIBIT No. 79

1

December 14, 1962.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Mr. Miner:

We enjoyed the meeting held in my office on November 27, 1962, with representatives of your cooperative and the cities of Tazewell and New Tazewell to discuss the possibility of the cities obtaining more economical power.

The cities decided upon certain actions which they should take which included resolutions by each city, appointment of a joint committee, contacting the Tennessee Public Service Commission, and obtaining an appraisal of distribution facilities and customers in the two towns. We would appreciate being kept currently advised of any developments.

We assure you that TVA will continue to provide your cooperative's future power requirements in the vicinity of Tazewell.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

CWH:VGL

CC: Paul S. Button, 815 PRB, Chattanooga

[fol. 1342] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 20 to deposition of C. Wilson House

COTTRELL & HOUSE, INC.
Engineers
P. O. Box 6507
Nashville 12, Tennessee

January 4, 1963.

Hon. James B. Debusk, Mayor
New Tazewell, Tennessee
Hon. Joe F. Essary, Mayor
Tazewell, Tennessee

Re: Proposal for Utilities Appraisal

Dear Sirs:

Attached in duplicate is our [attached] Proposal for preparation of an appraisal of Kentucky Utilities Company Electrical Distribution System in your area. I want to apologize to you for taking this long to submit the proposal to you but, due to the holidays and an effort to estimate our costs as accurately as possible, some time was required in preparing it.

At the same time I met with you, I was not aware of the extent of Kentucky Utilities Company's rural lines in your area or the roughness of the terrain involved. After looking the system over I found that my preliminary estimate was low.

You will note that the proposal is in two parts. Should you select only Part I, it is estimated that we can complete this in approximately six weeks after you authorize us to proceed. If you select both Part I and II, it is estimated that approximately two months would be required to complete both parts.

We are prepared to proceed with the appraisal immediately if you so desire.

If you have any questions about this proposal, please feel free to call us.

Should you desire to accept either Proposal, the Mayor of each city should sign all copies of the attached Proposal

[fol. 1343] indicating whether Proposal I or II is accepted. They should be attested by the proper person for each city. One copy should be returned to us as authority to proceed with the work.

Yours very truly, Cottrell & House, Inc. /s/ R. H. Cottrell, Jr.

RHC:kw

Blind cc: Mr. Ralph Miner

[fol. 1344]

COTTRELL & HOUSE, INC.
Engineers
P. O. Box 6507
Nashville 12, Tennessee

January 4, 1963.

Hon. James B. Debusk, Mayor
New Tazewell, Tennessee
Hon. Joe F. Essary, Mayor
Tazewell, Tennessee

Re: Appraisal of Utilities Properties

Dear Sirs:

In accordance with our discussions on December 18, 1962, with you, Mr. E. J. Hardin, III, and Dr. William Smith, we are submitting herewith our proposal for making an inventory and appraisal of the Electric Distribution System now owned by the Kentucky Utilities Company in your area.

We propose to do the following:

1. Prepare maps of the existing utility system own owned by the Kentucky Utilities Company. Maps in the urban area will be prepared to the scale of 1" = 100 ft. Maps of the rural area will be prepared to the scale of 1" = 500 ft. The base maps prepared will be of a permanent type of film or linen which can be used to show the lines as they actually are when they are rebuilt as a portion of your system. The facilities may then be accurately located on the base maps based on actually measured distances. For this appraisal, reproducible tracings will be prepared from the base maps. On these maps, the poles and facilities will be located by observation.

2. Inventory the existing K. U. facilities, determining the average depreciation of them by observation. The inventory can be used for preparation of Plant in Place records when the system is acquired.

3. Based on the inventory, prepare an estimated present-day reproduction cost of the system. To this would be applied the observed depreciation to determine the present-day value of the facilities.

[fol. 1345] 4. Prepare rate comparisons for representative

Residential and Commercial usage between your existing rates and those charged by the Powell Valley Electric Cooperative.

5. Submit the report in person to your city councils jointly or to any group you designate, answering any questions you may have.

6. Assist you in any additional meetings you may require for acquisition of the system up to 4 man-days including travel time and a maximum of 1200 miles of travel by car.

We have submitted our proposals in two parts. They are as follows:

Part I—Consists of an appraisal of New Tazewell, Tazewell, the area between the two cities, and the area within approximately ¾ mile of the center of each city. This would include all items listed above.

Part II—Consists of an appraisal of the balance of the electric distribution system operated by Kentucky Utilities Company in Tennessee south of the Powell River. It is assumed that the appraisal of this system would be done at the same time as Part I and the report would be included with Part I.

Compensation for this work would be as follows:

Part I —the sum of $2,100.00
Part II—the sum of $1,700.00

For extra work in conjunction with meetings for the acquisition of the system over and above the time included in the proposal, compensation would be at the following rate:

Principal Engineer	—$70.00 per day
Subsistence	—Actual cost
Transportation	—Automobile $0.08 per mile
Public Transportation	—Actual cost

The above rate applies only to the officers of the firm, R. H. Cottrell, Jr., or L. A. House. If it is necessary for other employees to do work over and above that included in this proposal, a separate agreement will be negotiated. [fol. 1346] The above proposal does not include preparation of studies for duplicating the existing system or for

work involved in connecting it to the TVA or Powell Valley Electric Cooperative System.

Payment for the work covered shall be due within 90 days after submission of the report. If payment is not made by that time, interest will be charged from that date hence at the rate of 6% per annum.

Respectfully submitted, /s/ R. H. Cottrell, Jr., Pres.,
Cottrell & House, Inc.

Acceptance

Proposal(s)————————are hereby accepted.

Date: ——, ——. New Tazewell, Tennessee

Mayor.

Attest:

Title.

Date: ——, ——. Tazewell, Tennessee

Mayor.

Attest:

Title.

RHC:kw

Blind cc: Mr. Ralph Miner

[fol.1347] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 21 to deposition of C. Wilson House

May 28, 1963.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

Mr. C. A. Reidinger and I plan to meet you and your attorney in my office here in Knoxville on Friday, June 14, at 10:30 a.m.

Very truly yours, Tennessee Valley Authority. C. Wilson House, District Manager, Office of Power.

CWH:MHR

CC: Paul S. Button, 815 PRB, Chattanooga
C. A. Reidinger, 619 NSB, Knoxville

[fol. 1348] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 22 to deposition of C. Wilson House

EXHIBIT No. 80

6-20-63.

For:

Paul S. Button
815 PRB

Chattanooga [X]

6-20-63.

From:

C. Wilson House
26 UAB

Knoxville [XX]

Powell Valley Electric Cooperative—Tazewell and New Tazewell

Ralph Miner called me today and advised me the following: Phil Ardery has returned from Europe and called Miner yesterday. Miner met with the mayors of the two towns yesterday. A meeting of the mayors and Ardery has been set for July 12. Miner believes they will employ him. Miner discussed with the mayors the items which will be included in letter regarding agreement, which seemed to please them. They decided it best that no letters be written (including TVA's letter to cooperative, advising town can be served with TVA power) until after they talk (and employ, we hope) with Ardery.

CWH:MHR

CC: C. A. Reidinger, 619 NSB, Knoxville

Jun. 25 1963

[fol. 1349] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 23 to deposition of C. Wilson House

EXHIBIT No. 81

Paul S. Button, Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville

August 27, 1963

Powell Valley Electric Cooperative—Tazewell and New Tazewell

We are attaching [attached] copy of [attached] letter of August 26, 1963, from Ralph B. Miner, and also copy of letter from the Mayor of Tazewell dated August 14 to the cooperative.

You will note in last paragraph of letter, Miner requests that TVA write the cooperative a letter regarding power supply. You will recall we agreed to sending such a letter at our meeting with Messrs. Miner and Cridlin in my office on June 14, 1963.

C. Wilson House.

CWH:VGL

Attachments

CC: C. A. Reidinger, 619 NSB, Knoxville

P. S. A meeting with Ralph Miner, Phillip Ardery, and possibly others is scheduled in my office on Thursday, September 5, at 10 a.m.

[fol. 1350] POWELL VALLEY ELECTRIC COOPERATIVE
REA
Jonesville, Virginia

Cooperative
Electricity
Ralph B. Miner
Manager

Telephone
Jonesville 52

August 26, 1963.

Mr. C. Wilson House
District Manager
Tennessee Valley Authority
26 UAB
Knoxville, Tennessee

Dear Mr. House:

We are enclosing copies of a [attached 8-14-63] letter from the Mayor of Tazewell, Tennessee. In this letter he sets forth his intention of buying out the existing power distribution system and requests that we furnish power.

It is our understanding that they want this Cooperative to operate and maintain the system and supply the electrical energy through our present distribution system by interconnecting the two systems. We understand further that the Cooperative will bill each consumer connected to the city's system at the same rate as the present consumers are billed with a possible exception in the case of the small user of energy.

In the light of the above, we request that you confirm to the Cooperative the willingness and ability of TVA to furnish adequate wholesale power to enable us to serve this system.

Very truly yours, Ralph B. Miner, Manager, Powell Valley Electric Cooperative.

RBM:mrr

[fol. 1351] TOWN OF TAZEWELL

Council Meets Every 2nd Tuesday 7:00 P. M.
Planning Commission Meets Every 1st Thursday 7:30 P. M.
Tazewell, Tennessee

August 14, 1963.

Ralph B. Miner, Esquire
Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Mr. Miner:

This is to inform you that the City of Tazewell proposes to acquire or construct an electric distribution system to furnish service to Tazewell and such other fringe area as is most economically feasible.

Counsel has given me an opinion that this action is fully authorized under the Tennessee Code and that Powell Valley Electric Cooperative under applicable law, both state and federal, is obligated to provide power and energy at appropriate wholesale rates for use in such a distribution system when acquired or constructed.

This is to request that you confirm to us your ability and willingness to provide the Tazewell electric system with power as it is ready for service.

Yours very truly, Town of Tazewell, Tennessee.
E. J. Hardin, III, Mayor.

[fol. 1352] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 24 to deposition of C. Wilson House

August 30, 1963.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

This is to confirm arrangements made earlier this month for a conference to discuss possible service to Tazewell and New Tazewell.

We plan to meet you and Mr. Ardery in my office at 418½ Union Avenue, Knoxville, on Thursday, September 5, 1963, at 10 a.m., EST.

I am looking forward to seeing you and meeting Mr. Ardery next Thursday.

Very truly yours, Tennessee Valley Authority. C. Wilson House, District Manager, Office of Power.

CWH:VGL

CC: Mr. Phillip P. Ardery
Brown, Ardery, Todd & Dudley
Kentucky Home Life Building
Louisville 2, Kentucky
Paul S. Button, 815 PRB, Chattanooga x
C. A. Reidinger, 619 NSB, Knoxville
T. Graham Wells, Jr., 813 PRB, Chattanooga

[fol. 1353] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 25 to deposition of C. Wilson House

September 9, 1963.

Mr. Philip P. Ardery
Brown, Ardery, Todd, and Dudley
Kentucky Home Life Building
Louisville 2, Kentucky

Dear Mr. Ardery.

As requested, I am listing below TVA representatives who were present at the meeting with you and Ralph Miner in my office on September 5, 1963:

Paul S. Button, Director, Division of Power Marketing, Chattanooga
T. Graham Wells, Jr., Chief, Distributor Marketing Branch, Chattanooga
C. A. Reidinger, Division of Law, Knoxville
Edgar H. Drum, Division of Law, Knoxville
C. Wilson House, District Manager, Eastern District, Knoxville

As requested, I am enclosing a copy of REA Bulletin 1-7. We enjoyed our discussion with you last week.

Very truly yours, C. Wilson House, District Manager, Office of Power.

CWH:VGL

Enclosure

[fol. 1354] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 26 to deposition of C. Wilson House

EXHIBIT No. 82

September 23, 1963.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

This is in response to your [attached] letter of September 13, 1963, enclosing a copy of a letter dated September 11, 1963, from the mayors of the towns of Tazewell and New Tazewell in which they informed you that the towns propose to acquire or construct an electric distribution system to serve the people of the area.

As we have previously indicated to you, TVA will continue to make power available to serve your power requirements in the Tazewell-New Tazewell area. In the event the towns of Tazewell and New Tazewell acquire or construct a distribution system as proposed, power will be made available to the cooperative for service to the loads on that system if an appropriate lease or purchase arrangement is developed so that the consumers will be served as a part of the Powell Valley Electric Cooperative's system.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager.

TGW:PSB:AP

CC: Paul S. Button, 815 PRB, Chattanooga x
C. A. Reidinger, 619 NSB
T. Graham Wells, Jr., 813 PRB, Chattanooga

[fol. 1355] Paul S. Button, Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville

September 16, 1963

Powell Valley Electric Cooperative—Tazewell and New Tazewell

We are attaching copy of [attached] letter dated September 11, 1963, from the mayors of Tazewell and New Tazewell to the cooperative, and also copy of [attached] letter of transmittal dated September 13, 1963, from the cooperative to TVA.

At our meeting with Miner and Ardery on September 5, we advised them that TVA would write the cooperative concerning power supply after receipt of the joint letter from the towns.

C. Wilson House.

CWH:VGL

Attachments

CC: C. A. Reidinger, 619 NSB, Knoxville

[fol. 1356] POWELL VALLEY ELECTRIC COOPERATIVE
REA
Jonesville, Virginia

Cooperative
Electricity
Ralph B. Miner
Manager

Telephone
Jonesville 52

September 13, 1963.

Mr. C. Wilson House
District Manager
Tennessee Valley Authority
26 UAB
Knoxville, Tennessee

Dear Mr. House:

We are attaching copies of a [attached 9-11-63] letter from the Mayors of Tazewell and New Tazewell, Tennessee. In this letter, they set forth their intention to acquire or construct electric distribution facilities inside the towns and some fringe area.

They request that we furnish power for use by this system; and as we understand it, this would be done by interconnecting the two systems. Under this arrangement, we would bill the consumers of this system at the same rates as the present consumers of the Cooperative are billed with a possible exception of those using less than 50 KWH per month.

In the event they should acquire this system and we should make arrangements to operate it for them, would you be willing and able to provide such additional power as would be needed to supply the load?

Yours very truly, Ralph B. Miner, Manager, Powell Valley Electric Cooperative.

RBM:mrr

[fol. 1357] TOWN OF TAZEWELL

Council Meets Every 2nd Tuesday 7:00 P. M.
Planning Commission Meets Every 1st Thursday 7:30 P. M.
Tazewell, Tennessee

September 11, 1963.

Ralph B. Miner, Esquire
Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Mr. Miner:

This is to inform you that the cities of Tazewell and New Tazewell propose to acquire or construct electric distribution facilities sufficient to furnish service to the two towns and such other fringe area as is most economically feasible.

Counsel has given us an opinion that this action is fully authorized under the Tennessee Code and that Powell Valley Electric Cooperative under applicable law, is obligated to provide power and energy for use by the consumers of the system when acquired or constructed.

This is to request that you confirm to us your ability and willingness to provide the system with power as it is ready for service.

Yours truly, Mayor E. J. Hardin, III, Town of Tazewell. Mayor James B. DeBusk, Town of New Tazewell.

[fol. 1358] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 27 to deposition of C. Wilson House

EXHIBIT No. 85

September 24, 1963.

The Honorable Edward J. Hardin, III and
The Honorable J. B. DeBusk
Mayors of
Tazewell and New Tazewell

Dear Mayors:

The Board of Directors of Powell Valley Electric Cooperative has instructed me to inform you that service will be made available to the consumers of the electric system mentioned in your [attached] letter of September 11, 1963, upon request as the need arises at rates and charges not in excess of those applicable to other consumers on the cooperative system.

Very truly yours, Ralph B. Miner, Manager, Powell Valley Electric Cooperative.

RBM: mrr

Copy Sent to Button, Reidinger

[fol. 1359] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 28 to deposition of C. Wilson House

Paul S. Button, x Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
April 10, 1964
Powell Valley Electric Cooperative—Tazewell Case

We are attaching for your information copy of [attached] letter dated April 3, 1964, from Ralph B. Miner, Manager of Powell Valley Electric Cooperative, to Norman M. Clapp in reference to letter dated March 10, 1964, from Kentucky Utilities Company to Mr. Clapp.

C. Wilson House.

CWH:VGL

Attachment

CC: C. J. McCarthy, 629 NSB, Knoxville.
T. Graham Wells, Jr., 813 PRB, Chattanooga

[fol. 1360]

April 3, 1964.

Mr. Norman M. Clapp, Administrator
Rural Electrification Administration
Washington 25, D. C.

Dear Mr. Clapp:

In accordance with your request, we are setting forth herein the facts on the issues referred to in a letter to you from Mr. F. I. Fairman, President, Kentucky Utilities Company, dated March 10, 1964.

In paragraph nine of his letter, Mr. Fairman says "contractors, which were engaged in doing construction work for Powell Valley" started construction to connect K. U.'s customers to Powell Valley's line. This is a misleading statement. While the contractor *was* doing some work in the area for the Cooperative, the work Mr. Fairman refers to had nothing to do with the Cooperative. I understand this work was done under a contract between the contractor and the municipalities of Tazewell and New Tazewell.

The customers referred to as being "pirated by Powell Valley" are customers of the Tazewell and New Tazewell Power Board and not of the Cooperative. At the request of the towns, the Cooperative has agreed to operate and maintain the towns' facilities. The cost of operations, plus a small amount charged by the Cooperative for wheeling power over the Cooperative's lines, are borne entirely by the towns from revenue collected from customers. The towns receive the net revenue.

In the case of the twenty customers referred to, it is true that K. U. lines were disconnected by employees of the towns and the municipal service connected; and it is true this was done without K. U.'s approval.

But—the towns had written K. U. over a month prior to this and asked them to set a price on their facilities—K. U. didn't even acknowledge their letter.

In attempting to provide their own service, representatives of the towns could not get K. U. to remove their facilities, so, in most cases, I understand, the home owner either took the K. U. meter off or gave express orders to the municipal employees to do so.

[fol. 1361] As to Mr. Fairman's contention that this is in violation of the TVA Act, this is a question which will soon be settled by the Court.

As to his allegations that I "openly solicited" their customers in the Harrogate area, nothing could be further from the truth. The Optimist Club invited me to meet with them on February 24 to provide them with any information I could about the possibility of our Cooperative serving their communities. I did not make a speech; merely tried to answer their questions as honestly and truthfully as I could. Webster defines "solicit" as meaning "to ask for with earnestness," and I am sure any member of the Optimist Club can testify that I did not ask for anything.

Members of the Club told me that Mr. Smith, a K. U. Local Manager from Middlesboro, Kentucky, was invited to the next meeting of their Club following my visit. He did speak to them for quite awhile, I understand, on the merits of the Investor Owned Utilities.

Also, subsequent to the other events mentioned here, four residents of the communities of Arthur, Harrogate, Shawanee and Tipprell came before the Cooperative Board to re-

quest help for their communities. They had in their possession some petitions which had been placed in local places of business for people's consideration. They had space provided for signatures to petition the Cooperative to serve them and space to sign against such action. Of 258 signers, 253 had signed "for" and 5 "against." The Cooperative did not try to get this business and has taken no action in regard to these petitions.

Mr. Clapp, we believe we have been entirely fair and within our rights in this whole matter. No loan funds are involved nor are any of our general funds. This is purely a local matter, an attempt of the people to secure lower rates, not an attempt on our part to lure them away from K. U. Petitions circulated in the Tazewell-New Tazewell area were about 8 to 1 for acquiring a municipal system, and the people of the towns are willing to duplicate the facilities of K. U., if necessary, to accomplish these ends. We see nothing wrong with our Cooperative supplying power to municipalities which, on their own initiative and not at our instigation, have exercised their right to go municipal.

[fol. 1362] As Mr. Fairman requested in his letter to you, I am sending a copy of this letter to him. If there are any areas of this still not clear, will you please advise.

Very truly yours, Ralph B. Miner, Manager, Powell Valley Electric Cooperative.

RBM:mrr

CC: Mr. F. I. Fairman
Mr. William H. Callaway
Mr. Edward J. Hardin, III, Mayor, Tazewell, Tennessee
Mr. Bill DeBusk, Mayor, New Tazewell, Tennessee
Mr. Paris Coffey, President, Claiborne County Chamber of Commerce
Dr. George Day, President, Harrogate Optimist Club
Mr. LeRoy Evans, President, Tazewell Jaycees
Senator Spessard L. Holland
Senator Herman E. Talmadge
Senator George McGovern
Senator J. Howard Edmondson
Senator John Sherman Cooper
Senator J. Caleb Boggs

Senator E. L. Mechem
Senator Allen J. Ellender
Senator Richard B. Russell
Senator Carl Hayden
Senator Lister Hill
Senator A. Willis Robertson
Senator John Stennis
Senator Gale W. McGee
Senator Hubert H. Humphrey
Senator Mike Mansfield
Senator Milton R. Young
Senator Karl E. Mundt
Senator Roman L. Hruska
Senator Clifford P. Case
[fol. 1363] Senator Olin D. Johnston
Senator George D. Aiken
Representative W. R. Poage
Representative E. C. Gathings
Representative John L. McMillan
Representative Lester R. Johnson
Representative Frank A. Stubblefield
Representative G. Elliott Hagan
Representative Robert L. Leggett
Representative Clifford G. McIntire
Representative Don L. Short
Representative Ralph Harvey
Representative Robert Dole
Representative A. Fernos
Representative Jamie L. Whitten
Representative William H. Natcher
Representative Joseph P. Addabbo
Representative Walt Horan
Representative Robert H. Michel

Xerox copy—x

[fol. 1864] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 29 to deposition of C. Wilson House

May 5, 1964.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

I am sending to you under separate cover one print of map showing "Customers and Lines of TVA Power Distributors as of July 1, 1957, in Claiborne County, Tennessee". Our Legal Division says they do not object to you showing this map to REA if you want to.

I asked Lewis Wallace if they planned to have a meeting prior to May 13. He said they probably would and, if so, they would arrange the meeting through the attorneys.

Very truly yours, C. Wilson House, District Manager, Office of Power.

CWH:MLH

Enclosure

[fol. 1365] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 30 to deposition of C. Wilson House

EXHIBIT No. 84

POWELL VALLEY ELECTRIC COOP

COOPERATIVE ELECTRICITY

JONESVILLE, VIRGINIA

TELEPHONE JONESVILLE 52

March 18, 1964

Mr. C. Wilson House
District Manager
Tennessee Valley Authority
Knoxville, Tennessee

Dear Wilson:

I am enclosing the map of the Tazewells with the numbers you and I discussed and a list of corresponding numbers showing the consumer for each number and the date connected.

The prefix T A to the Account No. indicates a customer of Tazewell Municipal System — N T of the New Tazewell System.

The topographic maps enclosed have red circles around all consumers served from July 1, 1957 until these maps were made. (We sent them to Rufus Cottrell on April 21, 1958.)

We arrived at the red circled ones by pulling all the new accounts in Tennessee connected from July 1, 1957 until April 20, 1958 and locating them on the map. (There are 51 red circles.)

The only other note I had was the question, "Did we provide any service to the towns prior to July 1, 1957?"

According to our records, the answer to this is "No."

I enjoyed our excursion in "Big D" at the NRECA Meeting. I am glad TVA saw fit to have you there.

Very truly yours,

Ralph B. Miner, Manager
POWELL VALLEY ELECTRIC COOPERATIVE

RBM:mrr
Enclosures

KNOXVILLE, TENNESSEE
RECEIVED
MAR 19 1964
OFFICE OF POWER
DIVISION OF POWER MARKETING
EASTERN DISTRICT

RALPH B. MINER
Manager

CLYDE Y. CRIDLIN
Attorney

BOARD OF DIRECTORS

C. F. STEELE, President, Blackwater, Va.
C. H. SLEMP, Dryden, Va.
LOYD MUNCY, Vice President, Harrogate, Tenn.
OBIE YEARY, Ewing, Va.
O. C. ALBERT, Secretary-Treasurer, Jonesville, Va.
DR. JOHN PEARSON, Eidson, Tenn.
O. I. SNODGRASS, Jonesville, Va.
O. G. MOYERS, New Tazewell, Tenn.
RAY JARVIS, Sneedville, Tenn.

XEROX COPY
XEROX COPY

[fol. 1366] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 31 to deposition of C. Wilson House

March 26, 1964.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

Confirming our telephone conversation this morning, I am sending you under separate cover prints of maps of "Tazewell and New Tazewell" on which are shown the cooperative's and cities' customers and lines.

These maps were prepared from the information you furnished us recently. As requested, I am returning the maps you sent us.

It will be appreciated if you will check the maps and advise me of any changes, corrections, or additions which should be made.

Very truly yours, C. Wilson House, District Manager,
Office of Power.

CWH:VGL

[fol. 1367] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 32 to deposition of C. Wilson House

April 6, 1964.

Mr. Leonard Watson, Engineer
City of LaFollette Electric Department
LaFollette, Tennessee

Dear Mr. Watson:

As discussed during your telephone conversation with our Jim Ward last Friday, we are enclosing a copy of Topo Map 144-SW on which we would like for you to indicate (by dots) the location of customers served in the Claiborne County area represented on this map. It is understood that your electric system was providing service to 242 customers in this section of Claiborne County as of February 1964.

The map has been marked to indicate the location of LaFollette's power lines as discussed by you and Jim in February 1964. Please correct any errors we may have made in locating your power lines on the map.

Your assistance and cooperation in this matter is appreciated very much.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

JWW:VGL

Enclosure

[fol. 1368] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 33 to deposition of C. Wilson House

May 28, 1964.

Mr. Ralph B. Miner, Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Ralph:

In response to your telephone conversation today with our Jim Ward, we are enclosing four maps of the cities of Tazewell and New Tazewell showing Powell Valley Electric Cooperative's customers and power lines as of July 1, 1957, August 6, 1959, November 7, 1963, and after November 7, 1963.

If we can be of further service, please let me know.

Very truly yours, Tennessee Valley Authority.
C. Wilson House, District Manager, Office of Power.

JWW:PR
Enclosure

[fol. 1369] Paul S. Button, Director of Power Marketing, 815 PRB, Chattanooga
C. Wilson House, District Manager, Eastern District, 26 UAB, Knoxville
May 5, 1964
Tazewell Case—Maps

I am sending to you under separate cover one print each of maps which we have prepared for the Division of Law for use in the Tazewell case. We obtained the field information from Powell Valley and LaFollette.

C. Wilson House.

CWH:MLH

[fol. 1370] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 2 to deposition of Ralph B. Miner

EXHIBIT No. 57

Comparison of Kilowatt Hours Delivered in Claiborne County
During 1957 by

Powell Valley Electric Cooperative and Kentucky Utilities Company

K.U.Co. Deliveries		
From Tazewell Substation		4,471,200 KWH
From Cumberland Gap Substation		
Station Totalizer	6,278,400	
Delivered to Virginia	2,546,400	
Net to Claiborne County		3,732,000
From Bryson Mountain Substation		217,200
Total K.U. Deliveries in Claiborne County		8,420,400 KWH
P.V.E.C. Deliveries		
From Tazewell Substation		
Total KWH Taken	9,054,000	
Delivered to Other Counties	1,222,290[1]	
Net to Claiborne County		7,831,710 KWH
Total P.V.E.C. Deliveries in Claiborne County.		7,831,710 KWH

K.U. Company Delivered 51.8 percent of the Total Kilowatt Hours of Electrical Energy Supplied to Customers in Claiborne County by the two Distributors During 1957.

[1] According to best estimate of P.V.E.C. Manager, Ralph B. Miner, following review of Cooperative's records. This estimate supplied as Exhibit 2 of Mr. Miner's deposition of August 20, 1964.

EXHIBIT No. 5 to deposition of Ralph B. Miner

EXHIBIT No. 60

	Initials	D
Prepared By		
Approved By		

List of Persons attending Power Meeting at Cedar Grove. New Tazewell. Tenn. on 4-12-62.

CIVIL — CONT. — PLTF. — EXHIBIT — CC

CRIM. — DEF.

UNITED STATES DISTRICT COURT

Stanley R. Ford, Official Reporter

Name		Address
J.M. Greenfield	Pres. CGCC.	New Tazewell
Glen McCall Hall	Councilman	New Tazewell Tenn
Ed Gardner III	Councilman	Tazewell, Tenn
Lloyd Austin	Recorder	Tazewell, Tenn.
Carl Eidinger	TVA	New Tazewell Tenn
Paul Sullivan	TVA	Knoxville Tenn
C. Wilson Hines	TVA	Knoxville
Tom Cardwell	Councilman	Tazewell Tenn
Jas R. Creasy	Mayor	Tazewell Tenn
Ray Neely	Councilman	Tazewell Tenn
Frank M. Dunn		Tazewell, Tenn.
Floyd Rogers	Planning Comm.	New Tazewell, Tenn
Wm R. Bowman	Att. for Cities and CGC	Tazewell, Tenn
Harry Biddle	M.C.C.	Tazewell Tenn
T.V. Berry	Mgr. POEC	New Tazewell
Bill Welbush	Mayor N.T.	Jonesville, Va.
Reed Bunch	N.T. Merchants Com	
Ralph Miner	POEC	New Tazewell Tenn
Paul Coffey		Jonesville, Va.
		New Tazewell. Tenn

The purpose of this meeting was for the Members of the City Councils of both Cities to determine what if any, steps could be taken to secure lower cost power in the two towns, Tazewell and New Tazewell.

T.V.A. personell were present to let them know both what their position was. POEC people were present to learn what they wanted and to let it be known what their position was.

Apparently a territorial agreement between K.U. Company and POEC is a big factor in this case. This expires in May 1963.

TVA asked the Council Members if they had determined whether or not the people wanted cheaper power. Ans. Yes 90% or [illegible]. Also

Ques. T.V.A. - Has any effort been made to buy equity from K.U.

Ans - No.

[fol. 1372]

EYE EASE 45 807
20/20 BUFF 45 907

	Initials	Date 95
Prepared By		
Approved By		

T.V.A. statement - it is not feasible to operate a system of this size.

Council men would rather have PUEC or some other agency take over and own system eventually.

Towns may buy system - get PUEC to operate for a time then sell -

T.V.A. instructions: Councils to approach both K.U. and PUEC -

find out K.U. position on selling - PUEC on buying

(Re: R. will not finance duplicate systems but will loan money to buy existing one if PUC order 1533 - (this stated by Mr. Berry -

U.S. DISTRICT COURT, EASTERN DISTRICT OF TENN., NORTHERN DIVISION
KEN. UTIL. CO.)
V. C.A. 4361
TVA, ETAL)
Ex. No. 5 to deposition of
Ralph B. Manner
Georgella Manker
Notary Public

[fol. 1373] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 6 to deposition of Ralph B. Miner

Claiborne County
CHAMBER OF COMMERCE
Tazewell, Tennessee

October 23, 1962.

Mr. Ralph Minor
Manager
Powell Valley Electric Cooperative
Jonesville, Virginia

Dear Sir:

As representative of the Claiborne County Chamber of Commerce and the cities of Tazewell, New Tazewell and Cumberland Gap I wish to express the desire of these groups for a meeting with you and representatives of TVA for the purpose of discussing cheaper power rates for our citizens in this county who are not fortunate in receiving cheaper power.

It is our desire to have a joint meeting with the Chamber of Commerce and the cities on the 13th day of November, 1962 at 7:30 p.m. in the Tazewell Courthouse.

If this meeting meets with your convenience and the convenience of the officials of TVA please confirm.

Yours truly, William R. Stanifer.

WRS/lg

[fol. 1374] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 7 to deposition of Ralph B. Miner

EXHIBIT No. 61

On November 6, 1962, a meeting was held in William H. Callaway's Office in the Agriculture Building in Washington, D. C. The following people were present:

(1) William H. Callaway	Director, Northeast Area, REA, Washington, D. C.
(2) Ray P. Stokely	REA, Washington, D. C.
(3) James W. Black	REA, Washington, D. C.
(4) Arnold Whiteaker	Legal Counsel, REA, Washington, D. C.
(5) Ralph B. Miner	Manager, Powell Valley Electric, Jonesville, Va.

The purpose of this meeting was to discuss the possible acquisition of power facilities in Tazewell and New Tazewell, Tennessee. The people there have expressed an interest in lower cost power and have contacted the Cooperative relative to providing this power. During the course of subsequent discussion, it was decided the Cooperative could not borrow the money from REA to acquire these facilities, however, it might be possible to finance all or part of it from General Funds. An alternate method was discussed, that of the Cooperative operating and maintaining the system after the towns had purchased it from K. U. Preferably, under this plan, the Cooperative would retire the Revenue Bonds issued by the Towns as they came due, spend whatever was necessary out of General Funds to modify or improve the system; and when the bonds were retired would own the system. (Should be careful not to let Towns own it too long.)

Most of the discussion centered around this method, (bonds, etc.) and the following steps were outlined as a possibility for the two towns to consider:

(1) Get authority to own and operate system.
(2) Get authority from people to issue bonds.

(3) Engineering Firm to make engineering acquisition appraisal.—Rehabilitation and Integration.—New Construction.
(4) Arrange for power supply with T. V. A.
(5) City work out acquisition details with K. U.
(6) City arrange with P. V. E. C. for operations and eventual acquisition.
(Lease operate system—People would be customers not city.)
(7) Obtain necessary state and local approvals (Virginia Corporation Commission) (Have Cooperative Attorney check with Virginia Association Attorney) and Tennessee Statewide Attorney.
(8) Get necessary approvals from T. V. A. and R. E. A.

[fol. 1375] It was decided that the Board of the Cooperative should indicate at their next meeting whether they want to help these people in their quest for low cost power and instruct the Manager of their feelings—giving him and the attorney the necessary backing to do whatever they deemed wise and expedient to carry through on this.

It was the opinion of the group that there would be nothing wrong with the Manager showing an interest in the problems of these people and assuring them of the Cooperative's interest in them.

No agreement should be entered into with the Towns until after acquisition by them of the facilities.

If K. U. should lose in Middlesboro it might be wise for the Cooperative to approach K. U. relative to buying out their plant in the two towns—advising them the Towns are planning to force them to sell anyway. It would probably save them a good deal of money.

Revenue Bonds depend on the revenue from the electric system and do not jeopardize the Towns in any way.

Special considerations to consider were:

(1) What happens to the few rural consumers served by K. U. and the County-Wide Movement.

[fol. 1376] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 8 to deposition of Ralph B. Miner

EXHIBIT No. 62

On November 15, 1962, at 10:30 A. M., a meeting was held between representatives of TVA and Powell Valley Electric Cooperative in C. Wilson House's Office in Knoxville relative to Tazewell and New Tazewell, Tennessee, requesting service from some distributor of TVA Power. The following people were present:

C. Wilson House—Manager, Eastern District Division of Power, T. V. A.
Graham Wells —Chief, Distributor Marketing Branch, T. V. A.
C. A. Reidinger —Attorney, T. V. A.
Ralph B. Miner —Manager, P. V. E. C.
Clyde Y. Cridlin —Attorney, P. V. E. C.

The purpose of this meeting was to determine what course the people of the above towns should follow in procuring lower rates on the power consumed, and also to determine what course the Cooperative should follow in helping them. The following methods were discussed, and it was decided by this group that the Board of the Cooperative should decide which of the two plans they would follow so that when we meet with representatives of the Towns we can tell them exactly which way we think they should go:

Plan #1

(1) P. V. E. C. make sure of a power supply in the event K. U. cancelled Tri Party Agreement.
(2) Offer to buy out K. U.
(3) Under this plan we would need to be willing to approach K. U. with the idea that if they did not sell we would get this load some other way, probably by duplicating their system.

Plan #2 would be to advise the Towns to approach K. U. relative to buying out their system after having first had

an engineering firm appraise the property and having checked the appraisal with T. V. A. and P. V. E. C.

(2) Float Revenue Bonds in sufficient amount to buy our system.

(2a) P. V. E. C. would lease operate the system.

(3) P. V. E. C. would make necessary replacements and improvements and retire bonds. Also might buy a major part of the bonds initially.

[fol. 1377] As an added means of putting pressure on the K. U. Company, the Cooperative should contact the Utilities Commission in Nashville and ask for a hearing on the allocation of any territory to K. U. in this area.

We then should make a trip to the Commission and tell them we think K. U. should be ordered out of the towns for these reasons:

(1) K. U. rates are much higher.

(2) The people want our power 95% or more.

If they refuse to deny K. U. permission to serve this area tell them they should then order K. U. to lower their rates to the level of the Cooperative.

The two towns should adopt a resolution as follows: They want cheaper power—The Cooperative has this cheaper power—They demand that the Cooperative serve them either by buying out K. U. or duplicating their system.

(This would be a part of Plan #1.)

[fol. 1378] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 9 to deposition of Ralph B. Miner

EXHIBIT No. 63

On Tuesday, November 27, [1962] a meeting was held in C. Wilson House's Office in Knoxville, Tennessee, to discuss Tazewell and New Tazewell, Tennessee's request for help in securing low post power. The following people were present:

William R. Stanifer	—Attorney
Joe F. Essary	—Mayor of Tazewell
Bill DeBusk	—Mayor of New Tazewell
Paris Coffey	—Representative of Chamber of Commerce
Dr. William Smith	—Representative of Chamber of Commerce
Edgar H. Drum	—Law Division, T. V. A.
Ralph B. Miner	—Manager, PVEC
Clyde Y. Cridlin	—Attorney, P. V. E. C.
C. Wilson House	—District Manager, T. V. A.
Paul S. Button	—Director of Power Marketing, T. V. A.

There was a full discussion of what the people in the two towns desire and they let it be known that their purpose for having this meeting was to get advise as to the best means to secure this low cost power.

It was decided that the first step should be for the governing bodies of the two towns to adopt a resolution as follows:

(a) That the chief aim is to secure low cost power regardless of who the supplier might be.

(b) That they are determined to go all the way in securing low cost power.

(c) That they will procure a competent engineering firm who will make an appraisal of the existing facilities of the two towns along with the short extensions outside the corporate limits and also including the facilities along 25E as far north

as the Powell River Bridge. (Said facilities are now the property of Kentucky Utilities Company.)

The next step would be to approach Kentucky Utilities Company and ask their representatives if they would be willing to sell these facilities. If they are willing, ask them to make a price. If they are unwilling, inform them that the two towns intend to have low cost power if it means duplicating the system then this will be done. An offer would be made at this time based on the engineering appraisal as mentioned in the resolution.

[fol. 1379] Means of financing this venture were discussed and the consensus of opinion was that it would need to be financed with revenue bonds. These bonds do not obligate the towns in any way, but would be retired from the revenues of the electric system. Representatives of the Cooperative informed people at this meeting they would be willing to operate this system, make necessary replacement and improvements out of their general funds and retire the revenue bonds as they came due.

One further question that was brought up was: That if the people of Tazewell and New Tazewell approach the Public Utilities Commission and ask them to require the Kentucky Utilities Company to either lower its rates to the level of the rates charged by the Cooperative, or if they are unwilling to do this, require the Kentucky Utilities Company to sell their facilities, then if they do not get action and they adopt a resolution demanding that the Powell Valley Electric Cooperative duplicate their (K. U.) system, what position would the Cooperative take?

This question has since been asked of REA Officials in Washington and they advise they will let us know what their thinking is in this regard.

The engineering firm has also been contacted relative to a meeting with officials of the two towns. A meeting date is tentatively set for Tuesday, December 18.

[fol. 1380] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 10 to deposition of Ralph B. Miner

EXHIBIT No. 64

On Tuesday, December 18, [1962], at 1:00 P. M., a meeting was held in the Court House in Tazewell, Tennessee. The following people were present:

Ralph B. Miner	—Manager, P. V. E. C.
Earl Sandefur	—Superintendent, P. V. E. C.
R. H. Cottrell, Jr.	—Engineer, Nashville
J. B. Debusk	—Mayor, New Tazewell
J. F. Essary	—Mayor, Old Tazewell
E. J. Hardin, III	—Future Mayor, Old Tazewell
Dr. Wm. Smith	—Member Chamber of Commerce, Claiborne County

The purpose of this meeting was for representatives of the two towns to discuss with Mr. Cottrell an engineering appraisal of the facilities now owned by KU in the Tazewell and New Tazewell area including all rural distribution lines south of Powell River.

Mr. Cottrell gave the said representatives a brief idea of what this appraisal would be comprised of: A pole by pole analysis of the existing system as to installation cost, estimated age and net value in place. This would include maps showing the lines fairly accurately and from this appraisal a fairly close estimate could be made of duplicating facilities should this become necessary. Mr. Cottrell told the representatives of the two towns that he would make them a lump sum cost estimate for doing this work, including possibly three meetings with TVA or anyone they wished him to meet with. Extra meetings above this number would be paid for on a per diem basis.

These people questioned representatives of the Cooperative concerning:

(1) An office at Tazewell or New Tazewell for receiving payments of bills.
(2) Our Amortization Charge.

(3) Whether or not our Street Lighting Rate would be higher than what is now being paid KU.

(4) Whether our demand meter would have a 30-minute or 15-minute interval.

The answers from the Manager of the Cooperative to the questions were:

(1) He felt certain that the Directors of the Cooperative would be willing to provide this office for the convenience of the people when and if the two towns buy out the facilities and make arrangements with the Cooperative to operate them.

[fol. 1381] (2) In regard to the Amortization Charge, they were told that this charge would be eliminated as soon as it could be determined that it would not jeopardize the financial condition of the Cooperative.

(3) They were told that representatives of the Cooperative would check on the Street Lighting Rate and give them an estimated billing at some future date.

(4) They were informed that no 15-minute interval demand meters would be used in Tazewell or New Tazewell, furthermore, any 15-minute interval meters now owned by the Cooperative would eventually be converted to 30-minute interval.

[fol. 1382] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 11 to deposition of Ralph B. Miner

EXHIBIT No. 65

On February 12, 1963, a meeting was held in the Tennessee Rural Electric Cooperative Association Building in Nashville, Tennessee. The following people were present:

J. C. Hundley —Executive Manager, T. R. E. C. A.
Alfred MacFarland—Attorney, T. R. E. C. A.
Ralph B. Miner —Manager, P. V. E. C.
Clyde Y. Cridlin —Attorney, P. V. E. C.

One purpose of this meeting was to discuss with the T. R. E. C. A. people the developments in the Tazewell-New Tazewell Area in regard to their seeking lower power rates than are now available from K. U. Company.

They were presented copies of all the notes that had been taken at meetings between representatives of PVEC and REA, PVEC and TVA, PVEC, TVA and City Officials of both Tazewell and New Tazewell and finally between PVEC, City Officials and Cottrell & House, Engineers.

The TRECA attorney concurred in everything that had been done and stated that we probably were doing everything we could until the Towns moved further. He did recommend, however, that the Towns appeal to the Public Service Commission for K. U. Company to be required to "show cause" that their bills are nearly double that available from other sources in the area.

Another point discussed with no opinion voiced was whether the two towns would be bound by a Franchise signed by the County before the Towns were incorporated, authorizing K. U. to serve the area.

The Manager and Attorney of TRECA made themselves available to PVEC or Representatives of the Towns for any service they might be able to perform and made it very clear they would like to see PVEC serve the Towns.

The Attorney thought it would be a good idea for PVEC to buy a large part of the Bonds when and if they are issued, if not all of them.

The second item was PVEC being made exempt from Tennessee Sales Tax on items bought and delivered to them in Tennessee. TRECA Attorney advised PVEC to write Kenneth Herrell, Director, Sales Tax Division, Tennessee Department of Revenue, War Memorial Building, Nashville, and ask for an Exemption Number.

TRECA Attorney's full business name: MacFarland and Reed, 107 West Market Street, Lebanon, Tennessee.

[fol. 1383] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 12 to deposition of Ralph B. Miner

EXHIBIT No. 66

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration
Washington 25, D.C.

Aug. 29, 1963.
Ref.: Va. 34

Mr. Ralph B. Miner, Manager
Powell Valley
Electric Cooperative
Jonesville, Virginia

Dear Mr. Miner:

We have reviewed the information you have provided us concerning electric service in the towns of Tazewell and New Tazewell, Tennessee.

It is understandable from our previous discussions that the people of these towns are dissatisfied with the rates which Kentucky Utilities Company charges them for power and, as a result, the towns have been giving consideration to forming municipally owned systems with a view to obtaining power at TVA rates. We can also appreciate the fact that the representatives of the towns have contacted you to ascertain the extent to which your cooperative can participate in this effort to obtain TVA power. You are, of course, interested in keeping abreast of any developments concerning power supply not only in the towns but in the area around them because your cooperative serves in the rural area around the towns and the establishment of municipally owned or operated systems may affect your service area.

The matter of the source of power for the inhabitants of the towns is purely a local question. You are correct in believing that you must keep informed about the plans of the towns in the interest of protecting your own business in the area. There would appear to be no grounds for REA ob-
[fol. 1384] jecting to your supplying information to the towns or rendering such other assistance as is within your

corporate powers provided that the initiative for changing the source of power supply in the towns continues to come from them. As previously discussed, the cooperative should certainly not engage in promoting a change of power supplier in the towns.

REA loan funds as you know are not available to finance construction of any facilities to implement a plan for substituting another power supplier for that presently serving the towns. Also it is our understanding that the use of general funds is not being contemplated for this purpose. In this connection, you may wish to review REA Bulletin 1-7 which sets forth guidelines for the use and investment of your cooperative's general funds.

We hope that this letter will be helpful to you and your board of directors in future consideration of this matter. Please do not hesitate to communicate with us if we can be of any further assistance.

Sincerely yours, William H. Callaway, Director, Northeast Area—Electric.


SECTION No. 2
MAP No.
APPROVED KENTUCKY UTILITIES CO.
BY
DATE
APPROVED POWELL VALLEY R.E.C.C.
BY
DATE
GOVT.
PLTF.
DEFT.
UNITED STATES DISTRICT COURT



[fol. 1385] IN UNITED STATES DISTRICT COURT

EXHIBIT No. 13 to deposition of Ralph B. Miner

EXHIBIT No. 67

Tazewell—New Tazewell Power Board Accounts as of August 21, 1964

Acct. No.	Name	Address	Date Connected
NT-2	Hobert Minton	New Tazewell	11-7-63
NT-3-C	V.F.W. Post 8779	New Tazewell	11-7-63
NT-4	Charlie Venable	New Tazewell	11-2-63
NT-5	Lloyd Ramsey	New Tazewell	11-4-63
NT-6-H	Kennith Western	New Tazewell	11-4-63
NT-7	Darell Campbell	New Tazewell	11-4-63
NT-8	Danna Day	New Tazewell	11-4-63
NT-9	Mossie Keck	New Tazewell	11-4-63
TA-10	Junior Chadwell	Tazewell	11-7-63
TA-11-C	Brooks Furniture Mfg. Co. Inc.	Tazewell	10-31-63
TA-12	Cecil Hurst	Tazewell	10-31-63
TA-13-C	Skyview Restaurant	Tazewell	11-31-63
TA-14	Josephine McMurry	Tazewell	11-7-63
TA-15	Jim McMurry	Tazewell	11-7-63
TA-16	Clarence Mullins	Tazewell	11-7-63
TA-17-C	Cardwell Furniture Co.	Tazewell	3-20-64
TA-18-H	Leota Marshall	Tazewell	11-4-63
TA-19	Andrew J. Tabor	Tazewell	11-13-63
TA-20-C	Brooks Oil Co.	Tazewell	1-17-64
TA-21	L.P.S. Builders	Tazewell	4-14-64
NT-23	Mack Grey	New Tazewell	6-2-64
TA-24	Dr. George T. Novinger	Tazewell	7-16-64
NT-25	Robert England	New Tazewell	7-22-64
TA-26-C	Harrell and White	Tazewell	7-28-64

[fol. 1386] IN UNITED STATES DISTRICT COURT

EXHIBIT NO. 14 to deposition of Ralph B. Miner

Memoranda on the Taze—New Taze Power Situation, by RBM.

Summary of My Knowledge of the Tazewell—New Tazewell Power Situation

On April 12, 1962, Francis E. Berry asked me whether or not I had time to go to Tazewell with him to a meeting. I replied that I had the time if he wanted or needed me to go. I was Superintendent at the time. I did not know until we started what the purpose of the trip was. He said we were to meet representatives of the two Tazewells relative to their securing power through our Cooperative. The meeting was held at Cedar Grove Inn, west of New Tazewell, and the following people were in attendance:

J. M. Campbell	Pres., Claiborne County Chamber of Commerce—New Tazewell
Glen McCallough	Councilman—New Tazewell, Tennessee
E. J. Hardin, III	Councilman—Tazewell, Tennessee
Douglas Overton	Recorder—Tazewell, Tennessee
C. A. Reidinger	TVA—Knoxville, Tennessee
Paul S. Button	TVA—Chattanooga, Tennessee
C. Wilson House	TVA—Knoxville, Tennessee
Rome Cardwell	Councilman—Tazewell, Tennessee
Joe F. Essary	Mayor—Tazewell, Tennessee
Ray Neely	Councilman—Tazewell, Tennessee
Edward M. Duncan	Councilman—New Tazewell, Tennessee
Lloyd Moyers	Planning Committee — Tazewell, Tennessee
Wm. R. Stanifer	Attorney for Cities and Chamber of Commerce—Tazewell
Harry B. Rowe	PVEC—New Tazewell, Tennessee
F. E. Berry	Manager, PVEC—Jonesville, Virginia
Bill Debusk	Mayor—New Tazewell, Tennessee

Reed Bailey	New Tazewell Merchants Association—New Tazewell
Ralph Miner	PVEC—Jonesville, Virginia
Paris Coffey	Councilman—New Tazewell, Tennessee

The Representatives of the two towns stated they intended to have TVA Power by some means or the other. They wanted to know whether our Cooperative could help them and whether TVA would be willing to provide the power. They stated very plainly that they did not care which distributor furnished the power so long as they could have rates equivalent to those available to members of the Cooperative around the towns.

They knew the Cooperative had a Territorial Agreement with Kentucky Utilities Company and asked that this be cancelled as soon as possible.

TVA questioned them carefully to ascertain whether or not this desire was shared by a majority of the people in the two towns. They assured TVA that at least 90 per cent [fol. 1387] of the residents of the two towns would be behind them in any effort to secure a TVA Power Supply.

They were told by TVA that a system of this size was not feasible to operate on its own. They replied they did not intend to operate it if they could lease it to a TVA Distributor.

They asked Mr. Berry if the Cooperative could buy the system. He replied that no loan funds would be available to duplicate the system, but it might be possible to borrow money to buy it if it were for sale.

Mr. Berry passed away the following day of a heart attack.

The next contact I had was after I had been made Manager of the Cooperative. Representatives of the Claiborne County Chamber of Commerce requested that I make arrangements for them to visit the Cannery at Big Stone Gap, Virginia, and go with them up there to see their operation. I did so, and while these people were in the office they asked whether or not they could get any help from the Cooperative toward getting TVA Power. I replied we would help them in anyway we could, but, in my opinion, any effort to get KU out of their area would have to be made by the towns

themselves. Mr. Carl Bowling was President of the Chamber of Commerce and did most of the talking.

He went back to the Chamber of Commerce and told them what had been said, so he told me later, and the Chamber of Commerce voted to find out what steps were necessary to change power sources and then turn the entire package over to the towns.

On October 23, William R. Stanifer, Tazewell, Attorney for both towns, wrote a letter to me requesting that I set up a meeting with Representatives of TVA so that they might discuss the situation. This I did, and the meeting was set for November 27, 1962, at 1:30 P. M.

The meeting was held, and the following people were present:

William R. Stanifer	—Attorney
Joe F. Essary	—Mayor of Tazewell
Bill DeBusk	—Mayor of New Tazewell
Paris Coffey	—Representative of Chamber of Commerce
Dr. William Smith	—Representative of Chamber of Commerce
Edgar H. Drum	—Law Division, TVA
Ralph B. Miner	—Manager, PVEC
Clyde Y. Cridlin	—Attorney, PVEC
C. Wilson House	—District Manager, TVA
Paul S. Button	—Director of Power Marketing, TVA

[fol. 1388] Representatives of the two towns again stated their intentions of getting TVA Power or KU to lower its rates in the area, and they were here to get advice. They were again told it would be necessary for them to get the system themselves, that neither the Cooperative or TVA could or would take an active part in this action. It was decided they should approach KU and see if they would be willing to sell, if not, then plans could be worked out from there. They were also advised to get an Engineering Firm to evaluate the system before they made any offer to purchase. They were told the Cooperative would operate the system for them.

Representatives of the towns asked me during this meeting to advise them on securing an Engineering Firm and

set up a meeting with Representatives of said firm. This I did. The meeting was set up for December 18, 1962, at 1:00 P. M. in the Court House in Tazewell. The firm was Cottrell & House of Nashville.

The following people attended this meeting:

Ralph B. Miner —Manager, PVEC
Earl Sandefur —Superintendent, PVEC
R. H. Cottrell, Jr.—Engineer, Nashville
J. B. Debusk —Mayor, New Tazewell
J. F. Essary —Mayor, Old Tazewell
E. J. Hardin, III—Future Mayor, Old Tazewell
Dr. Wm. Smith —Member Chamber of Commerce, Claiborne County

They were told by Mr. Cottrell about what could be expected in the way of work involved in making an evaluation of the system. He promised to send them a firm figure as to cost for doing the job. They questioned him on several different points and he gave them answers to as much as he could. They also questioned me about our willingness to operate the system and certain things they would expect if we should do so. These were: An office, Street Lighting Rate, Amortization Charge and the demand interval on our demand meters. I later sent Mr. Hardin an estimate on Street Lighting.

My next contact with these people was in February when they asked me to come to a joint meeting of the two Town Councils on February 11, 1963. The meeting was held in the Court House at Tazewell.

At this time, they asked me to set forth our intentions; and I made statements as follows:

(1) That we had had numerous requests from people in the area to help them obtain TVA Power, even to the point of people threatening to sue the Cooperative.

[fol. 1389] (2) That we were willing to help as much as we could, but that they (the towns) would have to take the initiative in any action.

(3) That our Cooperative was doing fairly well financially and could continue to do so without the the towns.

(4) That we would advise, but do not want to push them into anything—if they were satisfied as things were then so were we.

I later attended a Joint Meeting of the Councils at which they had a Dr. Puitt from the University of Tennessee, who was a representative of an organization known as the "Municipal Technical Advisory Service." The towns belonged to this organization and had him there to advise them in this power endeavor. He did not attempt to tell them what to do, merely advised whether he thought different things could be done legally.

My only function again was to reaffirm our position in the matter.

My contacts with KU have been for the most part with Mr. Asher, Mountain Division Manager, of Pineville, Kentucky.

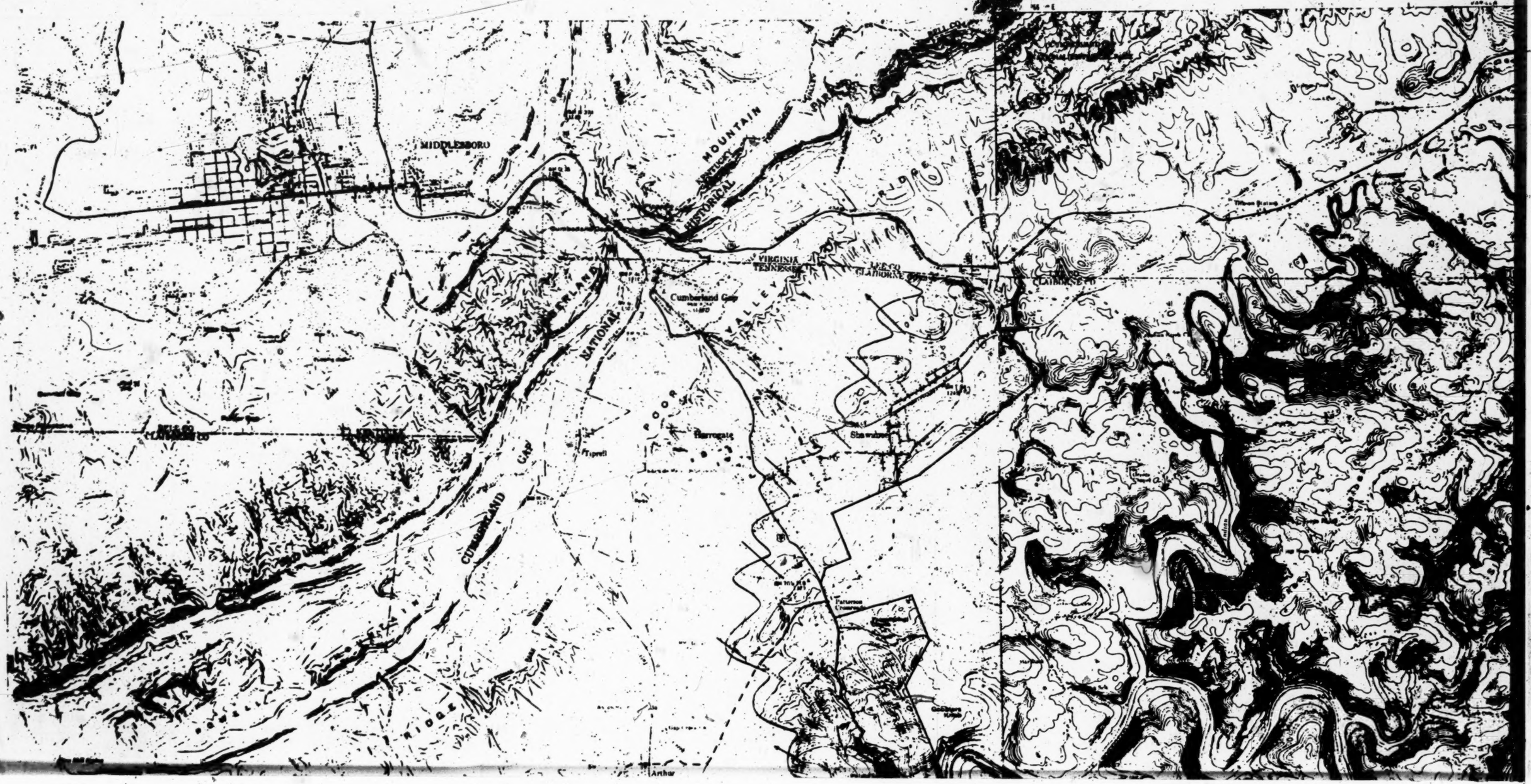
I told him as early as March, 1963, that this Cooperative had agreed to operate the power system for the towns provided they could acquire it. He said we could not do so because of restrictions in the REA Act and TVA Act. He also threatened once in a meeting at Tazewell not to heavy up the transmission line into the Tazewell Substation. I replied that power supply was between TVA and us, and I depended on TVA to make that type of arrangements and did not intend to become involved.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967—272-008/108

[fol. 1390]

In United States District Court

Exhibit No. 2 to deposition of Harry Rowe



In United States District Court

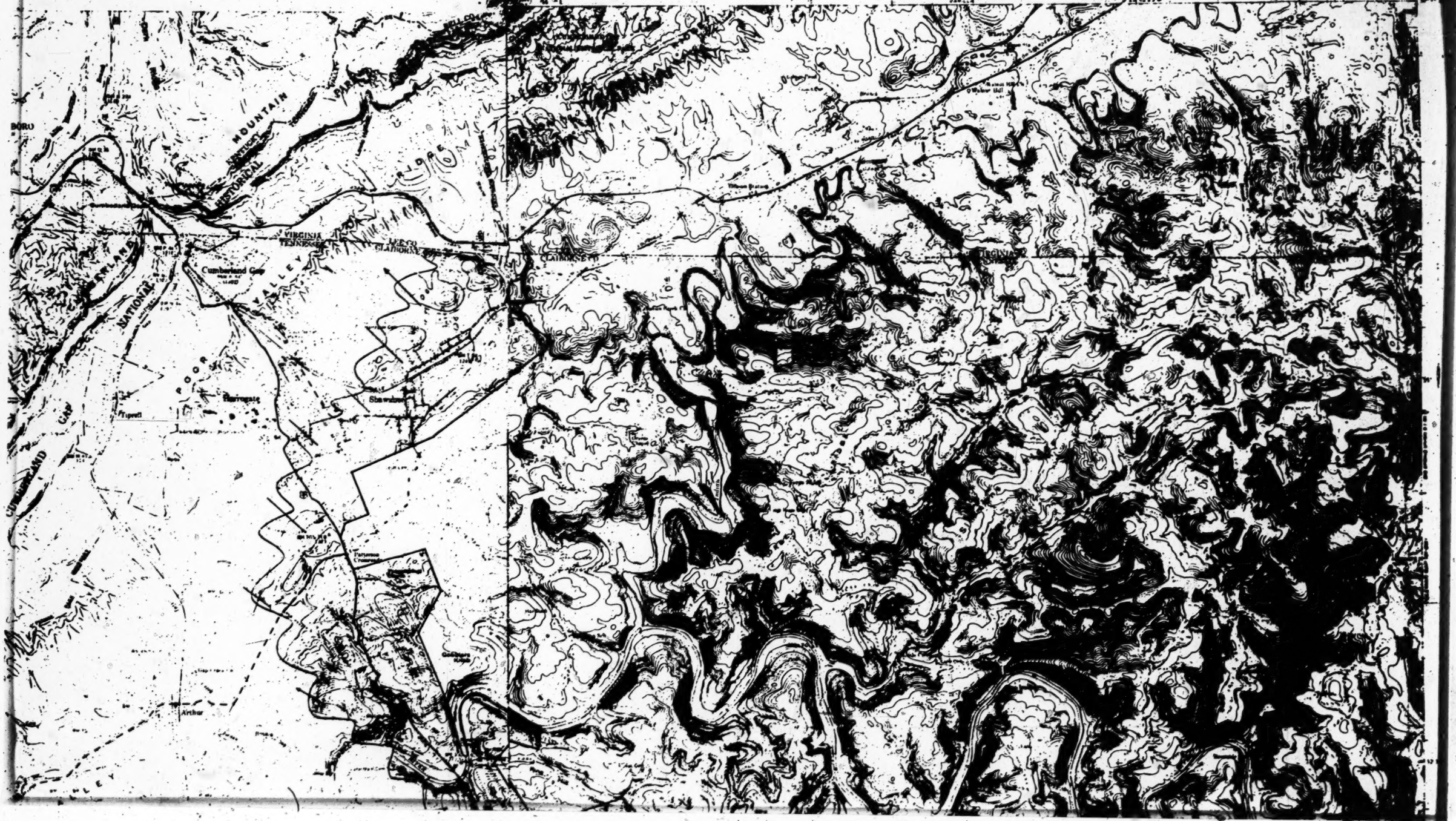
Exhibit No. 2 to deposition of Harry Rowe

EDITED

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

UNITED STATES
TENNESSEE VALLEY AUTHORITY
MAPS AND SURVEYS BRANCH

WHEELER QUADRANGLE
TENNESSEE-VIRGINIA
7.5 MINUTE SERIES (TOPOGRAPHIC) 1953



SUPREME COURT, U. S.

FILED
JAN 11 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

~~962~~ 510

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, and
JAMES B. DeBUSK, as Mayor of New Tazewell, Tennessee, - - - - - - - - Petitioners,

versus

KENTUCKY UTILITIES COMPANY, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PHILIP P. ARDERY,
BROWN, ARDERY, TODD & DUDLEY,
Kentucky Home Life Building,
Louisville, Kentucky 40202,

WILLIAM R. STANIFER,
Tazewell, Tennessee,
Attorneys for Petitioners.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee

AND

JAMES B. DEBUSK, as Mayor of New Tazewell, Tennessee, - - - - *Petitioners.*

v.

KENTUCKY UTILITIES COMPANY, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue so that this Court may review the judgment entered on November 15, 1966 in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion in this case of the United States District Court for the Eastern District of Tennessee is reported at 237 F. Supp. 502 (E.D. Tenn. N.D. 1964) and may be found as Appendix A to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at —— F. 2d —— (6th Cir. 1966) and may be found as Appendix B to this Petition.

Note:

App. A, B and C refer to Appendices printed herewith. Other Appendices are those in the record from the Circuit Court.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit is dated and was entered on the 15th day of November, 1966. There has been no rehearing. The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. In communities where both TVA and an investor company were providing power on July 1, 1957, did Congress by enacting the TVA Financing Act[1] destroy the right of the people to choose the supplier?

2. Does the TVA Financing Act cut off the right of a city to compete with an investor company in supplying power to its residents where the company has no city franchise and both company and a TVA distributor were supplying power on July 1, 1957?

3. Did the TVA Board of Directors in administrating its affairs under the TVA Financing Act have a responsibility to make the findings here made and do they have the binding effect of law?

4. Where the TVA Board makes findings under the TVA Financing Act, which findings are supported by substantial evidence, may these findings be judicially overturned?

STATUTE INVOLVED.

16 U.S.C. Sec. 831n-4(a) appears herein as Appendix C.

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[1] Whenever "the TVA Financing Act" appears herein, unless otherwise specified, it shall refer to public law 86-137; 73 Stat. 280; Title 16 U.S.C., § 831n-4(a). The full text of the section involved is contained herein as Appendix C.

STATEMENT OF THE CASE.

This case arises out of a dispute between Kentucky Utilities Company (KU) on one side, the Towns of Tazewell and New Tazewell, Tennessee, Powell Valley Electric Cooperative (PVEC) and TVA on the other. The question is whether TVA power may legally be distributed by the municipally owned electric systems of the towns to their citizens.

Prior to the advent of TVA, Dixie Power and Light Company, predecessor to KU, provided electric service to some locations in Claiborne County wherein the towns are located in northeast Tennessee. KU held a non-exclusive county franchise which gave it the right to occupy county roads along with other utilities.[1] It has never held a franchise from the towns. At a later date PVEC obtained a similar non-exclusive county franchise.[2]

In 1954 Dixie Power and Light transferred its assets to KU and was dissolved.[3]

The problem of competition in the area over electric service was the result of substantial rate differentials between KU on the one hand and the city systems of Tazewell and New Tazewell and PVEC (all TVA power distributors) on the other.[4]

Also there was evidence that the growth of PVEC service was the result of some failure of KU and its predecessor to be aggressive in providing service.[5]

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[1]App. 5b.
[2]App. 72a, 73a.
[3]App. 66a.
[4]App. 93b and 94b.
[5]App. 79b, 80b and 88b.

Mayor DeBusk of New Tazewell stated:

> ". . . my parents and neighbors was trying to obtain electricity because we was . . . we didn't have no refrigerators, we didn't have no facilities, we even used a Delco plant, and so the Powell Valley was coming down in that area and my Dad had done give a deposit of $5.00 for the power and when KU got the word or heard that they were coming in that area they rushed right at once and took them up.
>
> . . . . . .
>
> "That shows that we wouldn't have grown if we hadn't had TVA power or Powell Valley power, and I think the records show that."[1]

The rate differential resulted in construction of a large majority of new homes incorporating the principle of electric heat where those homes were built on lines of the city systems or PVEC.[2]

A comparison of the rates made by the PVEC manager showed that a certain level of consumption would produce a bill of $38.00 to a customer on PVEC lines whereas the same consumer would be billed $95.53 on KU lines.[3]

Land values were greatly affected and such construction as was undertaken was largely confined to lots where TVA power was available. There, the interpretation KU placed on the territorial restriction provisions of the 1959 TVA Financing Act is particularly

---

[1]App. 109b and 110b.
[2]App. 94b.
[3]App. 94b.

interesting as revealed in two interrogatories and answers.

KU was asked:

> "Q. 12. Do you contend that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the 'TVA area' as described in paragraph 10 of your complaint?
>
> A. Yes.
>
> Q. 13. If your answer to interrogatory 12 is in the affirmative, do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Electric Cooperative, is within the 'TVA service area' as defined in your complaint?
>
> A. No.'"[1]

The intense feeling of the people was indicated in a poll taken by the mayors which showed the people five to one or better in favor of receiving power from a TVA distributor rather than from KU.[2] The manager of Powell Valley tells his feeling that he is being forced to help the people, saying:

> "As manager of Powell Valley Electric Cooperative it would have been far easier for me to live with the territorial agreement with KU because I wouldn't have as many problems as I have probably if I lived with this agreement.

---

[1] App. 212b.
[2] App. 108b.

Q. Did you feel that whichever way you went you were going to wind up in court?

A. Yes, sir.

Q. What lead you to feel that way?

A. Well, from time to time people had in a roundabout way threatened to sue us, and as I said a while ago, our attorney said we might not be in too good a position in this situation.

Q. To refuse service to the public?

A. To refuse to serve these people."[1]

In the midst of the turmoil there was a city election in which the main issue was power and in which the candidates supporting KU's position were defeated and the candidates favoring Powell Valley and the city systems were elected.[2]

Also in the struggle one tactic employed by KU was an effort to get cities to grant city franchises.[3] This it did by offering money to the cities. The representative of KU in delivering the checks was indefinite as to what the purpose of the checks was, but the checks had typed on them "in return for perpetual franchise."[4] Paris T. Coffey, President of the Tazewell Chamber of Commerce testified:

"Q. And then I asked him, I said, would you give these checks to us without any strings being attached to them, and he—I don't remember exactly his reply about it. I said, we feel this is for a franchise, and he said, no, this is a dividend or something to that effect that we owe it to you, and

[1]App. 89b.
[2]App. 73b.
[3]App. 23b, 24b, 80b, 81b.
[4]App. 14b.

I insisted, the fact about, Mr. Smith and I had kind of a strong argument over the check and I said, if we are due it, Mr. Smith, we are due it without strings. If we are not due it, I don't think you can come over here and buy Tazewell for thirty some hundred dollars. That's the way I feel about it. We may be poor, but still we are independent from that angle.

"And so, he left the checks, and, also I'll put it this way, Mr. Smith brought it down to a personal affair, he said, what about your funeral home out there, if somebody wanted to repair something about your funeral home. I said, Mr. Smith, if you will put your power down in competition with your competitor, as I have mine with my competitors, well, we will welcome KU power, and we do. We have nothing against KU, but we do want cheaper power."[1]

Claiborne County, Tennessee, is a seriously depressed area in grave need of economic help.[2] Its condition of need caused many communications to pass between the representatives of the people in Tazewell and New Tazewell, largely through their mayors, in an effort to get Ku either to lower the rate or to sell its facilities to the cities' system.[3] These efforts were unavailing. The last communication by letter from the mayors to KU went unanswered for a period of five weeks until finally the towns established, pursuant to the Tennessee law, municipal systems and commenced construction of their own distribution lines.[4]

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[1]App. 80b, 81b.
[2]App. 78b, *et seq.*, 117b.
[3]App. 106b, 118b, 119b.
[4]App. 119b.

The city system was established by resolution of the city councils in October of 1963. The city employed a contractor to construct facilities to the points of service where service had been demanded. In one case there was a physical cutover from KU service to the city service without action on KU's part and this was done by Cecil Hurst, a motel owner. Hurst testified that he put in an application with the city and called KU to tell them to disconnect. After several fruitless attempts to communicate with KU he found the service manager of KU on the road.

> "I thought I'd get out and take after him and tell him, and went up the road about a mile and he turned around and I stopped and talked to him, and as soon as I started talking to him, he run off, and left me, and I had to run him down again and I ran him down in New Tazewell, and I blowed my horn, and he pulled over and stopped, and I told him I would like to discontinue Kentucky Utilities and he said, 'I'm not going to do it. I can't change. I can't take it loose.' "[1]

Hurst then tells about his going with the city contractor and obtaining a meter which he, jointly with the contractor, put on his motel physically changing the service from KU to the city service.[2]

In other cases when KU was requested to terminate service it did so with its own crew, sometimes in a rather surprising manner. Jerry Brooks, owner of the Brooks Furniture Manufacturing Company of Tazewell, tells how he called KU and a KU man came out

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[1]App. 74b, 75b.
[2]App. 75b.

and cut power off in the middle of a working day when he had a full crew on without even giving him a chance to shut down his machinery and thus avoid a possibly dangerous situation. In response to a question of KU counsel as to whether the manner of the cutoff was not reasonable from KU's viewpoint, Brooks comments:

> "The pole which carries the Kentucky Utilities service is not more than 50 feet to the entrance of my office, and since we had been buying power from KU these many years, I think Mr. Pressnell or someone from the uitlity company, should have at least shown me the courtesy of coming into my office and telling me they were going to cut the service. If they had I would not have objected to it, but I certainly would have gone out into my plant and turned off the motors and taken steps to prevent any damage to the machinery. Fortunately no damage was done."[1]

Shortly after the establishment of service from the system owned by the cities of Tazewell and New Tazewell, KU commenced this action.

One final and important point is necessary to a proper statement of facts herein. This is to recognize that on July 1, 1957 TVA distributors had lines completely surrounding the towns. They were supplying power at many points on all sides of the towns and in the area which the Circuit Court called KU's "corridor."[2] This is graphically portrayed by Exhibit 91. which is the only map precisely showing all users of TVA power in the area on that date. This map is

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[1]App. 70b.
[2]App. 48b.

attached to and made a part of the dissent of Circuit Judge Edwards in this case.[1] On July 1, 1957 KU was supplying 561 customers in the towns to 28 receiving TVA power. But in the total area of Claiborne County TVA distributors supplied 3,564 customers to 1,839 for KU. The average Kwh sales for June and July of 1957 were 1,015,000 to the TVA consumers compared to 610,000 for KU.[2] The foregoing is essential to determination of who was the primary source of power supply in that area on July 1, 1957.

REASONS FOR GRANTING THE WRIT.

1. The Right of the Consumer to Choose His Electric Service in Areas Where Both KU and TVA Power Was Available on July 1, 1957 Was Not Destroyed by the TVA Financing Act.

One of the more regrettable errors of the majority opinion of the Circuit Court lies in the fact that the Court gives absolutely no attention to the right of the people in the area. The opinion of the Court treats this case as nothing more than a battle between KU on the one hand and TVA and PVEC on the other (the court calls PVEC "PVA").

There is absolutely nothing in the TVA Financing Act to indicate that the rights of the people in those areas where both TVA distributors and other sources of power supply were available, were to be impaired. Indeed, the history of the Act clearly demonstrates the contrary.

[1] App. B following page 86.
[2] App. 213b.

We believe one of the bases of the incorrect conclusion reached by the 6th Circuit was the fact that the majority of the Court misread the legislative history of the Act. The Court comments at some length on the Vinson Amendment which became a part of the bill as it passed the House, but was eliminated prior to final passage. The opinion states:

> "During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.
>
> "In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accommodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *cf Hearing, Senate Committee on Public Works,* 86th Cong., 1st Sess., S 931 and H.R. 3460 pp. 39-51. (1959), between the Georgia Power Co. and TVA, *Id,* at 220, and indeed in our own case between KU and PVA, Rep. Vinson stated that his amendment 'writes into the law the "gentlemen's agreement." *Hearings, 86th Cong.,* 1st Sess., House Committee on Public Works, H.R. 3460, p. 111 (1959).'" ___ F. 2d ___; Appendix B, pp. 68, 69.

The Court then talks about the Senate version of H.R. 3460 which removed the language of the Vinson Amendment and replaced it with substantially different language prior to final passage. However, the Court

incorrectly states the language of the Vinson Amendment "ultimately became a part of the Act" and reasons from that position. The opinion further says:

> "In the Senate report (No. 470, 86th Cong., 1st Sess., 1959 on the final version of H.R. 3460, the Senate noted:
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> "'Although there has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stablization area should be defined and limited by law.*' U.S. Code Cong. and Adm. News, 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis supplied.)
>
> *"The 'others' were those who supported the Vinson Amendment which became a part of the bill."* (Emphasis supplied.) —— F. 2d ——; Appendix B, pp. 69, 70.

It is quite clear that Representative Vinson when he tacked on the Vinson Amendment was trying to help the Georgia Power Company in its efforts to restrict TVA. Representative Vinson stated his amendment would protect TVA consumers, but it was evident from his own statement that his real concern was for

> "the stockholders of the Georgia Power Company, the employees of the Georgia Power Company, as well as thousands upon thousands of individuals who have investments in private utility companies." H.R., 86th Cong., 1st Sess., on H.R. 3460 and H.R. 3461, Report No. 86-3 p. 110 (1959).

The language Representative Vinson inserted in the bill when it was before the House was as follows:

> "Unless otherwise specifically authorized by act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except, when economically feasible for exchange-power arrangements with other utility systems which the Corporation had such arrangements on said date." *Id.* at p. 111.

The language of the Act as passed is:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* . . ." (Emphasis Added.) 16 U.S.C. § 831n-4.

Overlooking this basic difference between the Vinson Amendment and the law as passed, we submit, was a major cause of the error committed by the 6th Circuit.

However, and to reiterate, it is interesting that nowhere in the opinion of the 6th Circuit does the Court recognize the interest of the people involved except in its caption. This again is error in that the caption includes Mayors Hardin and DeBusk "individu-

ally" as defendants against whom the judgment runs, as well as in their capacities as mayors. Yet, the action against the mayors in their individual capacities was withdrawn during the trial before the District Court.[1] Other than the mistake made regarding the mayors as individual defendants the Court simply refused to recognize any interests of the people of the communities despite the undenied fact that many of them had been receiving TVA power since before July 1, 1957.

Since the Act itself does not make specific mention of the right of individual ratepayers or the public generally in those areas where both TVA distributor lines and other lines existed, we submit it is appropriate to examine the legislative history of the Act on this point.

In the Senate Report where the bill obtained its final shaping it is stated:

> "In summation, the committee believes that H. R. 3460, as amended is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; prevent service to additional cities with a population in excess of 5,000 or 10,000 if they own their distribution systems; *protect the right of certain communities to choose their power supply;* protect the areas now being served by private, utilities; preserve existing contracts, interchange arrangements, and power supply to defense installations; and reduce the possibility of litigation and confusion arising from ambiguous terms. It further believes that

[1] App. 30a; Appendix A, p. 35.

> the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise." (Emphasis Added.) *Revenue Bond Financing by TVA*. Senate Report No. 470 July 2, 1959 p. 9.

Senator John Sherman Cooper incorporated a statement in the Congressional Record which emphasized the point as follows:

> "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." 105 Cong. Rec. 13052.

Judge Taylor of the Federal District Court, Eastern District of Tennessee, recognized this in his opinion and states that the Senator "apparently had no question about its authority under the Amendment to serve municipalities inside the periphery." 237 F. Supp. 502 at 511; Appendix A, p. 52.

Another point of serious error in the opinion of the 6th Circuit is where the Court comments:

> "TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and therefore, it is no business of KU where these municipal systems obtain

> their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit." ___ F. 2d at ___; Appendix B, pp. 79-80.

What the Court is in essence saying is that the towns have a right to compete but at the same time the judgment of the Court destroys any possibility of competition. Similarly, at another point in the Opinion the Court says:

> "KU does not have an exclusive franchise, and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area." ___ F. 2d at ___; Appendix B, p. 80.

In other words, anybody has a right to compete with KU—anybody, that is, except those who have any possible chance of competing. There are only two suppliers of power for resale in the area. The Court says one may no longer supply power. Does this not in effect give the other a perpetual and exclusive franchise? We think it obviously does.

As shown in the statement of facts, herein, the towns withstood considerable bludgeoning on the part of KU in its efforts to obtain franchise rights within the cities. But, as has been stated, what the Court does is say to KU, since the towns have refused you an exclusive franchise, we are going to write one out and hand it to you.

The Court's Opinion further says:

> "From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, in July 1, 1957, a part of and within the total areas served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts 'for the sale or delivery of power.'" ____ F. 2d ____; Appendix B, p. 7.

The far reaching effect this language, which we think was totally beyond any contemplation of Congress in the TVA Financing Act, is that it says that TVA and its distributors, both the city municipal utility systems and PVEC, have to get out of the towns. There was absolutely no discussion in the Act or in any of the committee hearings to the effect that TVA power distributors would have to give up customers they then had. Yet this is precisely what the Circuit Court says must be done.

2. The TVA Financing Act Did Not Impair the Right of the Cities of Tazewell and New Tazewell to Compete With KU and, in so Doing, Distribute TVA Power in an Area Where It Was Being Distributed on July 1, 1957.

As has been mentioned, the Circuit Court purports to emphasize that KU is not seeking protection from "all competition." And yet the judgment of the Court terminates one of only two sources which have offered power supply to the area for a period of many years. These two sources are also, as a practical matter, the only two possible sources of wholesale power supply available for distribution in the area. The Court thus holds that the TVA Financing Act gives KU an exclusive monopoly franchise which it has been unable to obtain from the people. The Tennessee statutes specifically give the towns the right to acquire their own electric systems and to supply power to their citizens in competition with KU. Tenn. Code Ann. §§ 6-1501 to -1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to -1318 (1955) (Revenue Bond Law). This authority has been sustained in the courts in the cases of *Keeble* v. *Loudon Utilities,* 370 S. W. 2d 531 (Tenn. 1963); *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22 (1906); *West Tennessee Power & Light* v. *City of Jackson,* 97 F. 2d 979 (6th Cir. 1938).

The effect of the Court's decision is to kill the cities' systems as distributors and to hold that the TVA Financing Act overrides the acts of the Tennessee legislature and withdraws the rights which the Tennessee law purports to afford. This is certainly a broad de-

parture from the development of law up to this point, for the right to TVA to afford competition to the investor companies has hitherto been well established in cases cited in the Opinion of the 6th Circuit, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA*, 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (CA D.C. 1955), cert. den. 350 U. S. 884 (1955).

Of course it might have been possible for Congress constitutionally to withdraw the right of competition, or of some competition by TVA and the towns as its distributors, or to circumscribe that competition. We believe the 1959 TVA Act does this in the area beyond the fringe area. But again, we come back to the language of the Act itself and to the statements made about the effect of that language in Congress at the time the Act was passed. The language of the Act to which we refer is, of course, the following:

> "Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within such area.
>
> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying

> electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act." 16 U.S.C. 831n-4(a)

The obvious purpose of this Act is to let TVA have some reasonable expansion beyond the area where it was serving July 1, 1957. Yet the effect of the judgment of the 6th Circuit will kill the cities' systems if they can serve no customers not being served on July 1, 1957. The fact that this was not the intent of Congress is shown by many of the committee comments on the bill when passed. In the final Committee Hearings, the report submitted by Senator Robert Kerr, Committee on Public Works, states:

> "The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power.
>
> . . . . . .
>
> "The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems

in the marketing of the bonds by TVA." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, pp. 8, 9.

Individual views of the opponents of the final language of the bill, Senators Winston L. Prouty and Jennings Randolph, are contained in this same report.

Senator Prouty stated his apprehensions about the language as follows:

> "It is the committee's intent, insofar as the territorial restrictions in the bill are concerned, to permit desirable minor adjustments on the periphery of the area presently supplied by TVA power to take care of natural growth within that area.
>
> "However, I believe that in its efforts to protect the rights of present customers of TVA the committee has approved language which would permit a city or any other present customer of TVA to resell TVA power to innumerable communities, whatever their size, and throughout other areas, however large.
>
> "In my judgment, the language in the bill as presently written permits the Tennessee Valley Authority to make contracts for the sale of power with States, counties, municipalities, corporations, partnerships, and individuals with which it had contracts on July 1, 1957, and these contracts would not be subject to a territorial limitation of any kind." *Id.* at 52.

Senator Randolph also voiced fears about the language but went on to say:

> "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." *Id.* at 54.

Thus we see two opponents of TVA interpreting the language of the Act entirely differently from the way it was interpreted by the Court of Appeals. This we should qualify to the extent that the Court of Appeals says KU service in the area does not constitute an island but is a peninsula. The question as to whether it was an island or a peninsula is best shown by the map, Exhibit 91, filed with Judge Edwards' dissent which specifically locates every point of service of TVA power in Claiborne County, Tennessee as of July 1, 1957.

The points of service in and around the towns as Exhibit 91 clearly shows are so numerous as to make it impossible to locate any corridor. Here also it is to be remembered not only does PVEC have a transmission line crossing the KU transmission line coming into Tazewell and New Tazewell but it also owns the substation from which all of KU's customers, all the customers of PVEC, and all customers of the city systems in the general area receive power.[1] The fact that KU owns a transmission line should be equated by PVEC's owning the substation from which all service is rendered in the area.

But the main point of importance, we think, is the fact of the myriad of service outlets of TVA power which existed as of July 1, 1957. The map also filed

[1]App. 185b.

with the dissenting opinion in the Circuit Court which purports to show a corridor of KU service does not show any specific points of service of KU and/or TVA distributors.[1] Moreover, it was prepared in 1952, five years prior to the date picked by Congress as the cutoff date to determine the general boundaries of TVA's primary service area. We submit the Court should judicially note the fact that the five years from 1952 to 1957 were years of enormous growth in the electric industry generally and in the Tennessee Valley, particularly. Therefore the map KU offered to show it served a corridor lacks relevance in that it is not tied to the magic date of the TVA Financing Act itself.

3. The TVA Board Does Have Responsibility in Administering Its Affairs Under the TVA Act to Make Findings and the Findings Here Made Have the Binding Effect of Law.

The Opinion of the Circuit Court leaves in serious question whether the Board of Directors of TVA has any appreciable responsibility to make findings or interpretations of the TVA Act to assist it in the administration of its affairs. The Court says:

> ". . . TVA argues, the 1959 Act must be read as committing to its board of directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's board such authority." ___ F. 2d at ___, Appendix B, p. 70.

[1]Appendix B, following page 86.

It was stated many times by the Committee that the final language of the Act was left to some degree imprecise respecting the area within which TVA's power might be distributed. This was deliberate, as the Committee said, because it believed it "desirable to authorize minor adjustments." This being so it is extremely difficult to rationalize, as the majority of the 6th Circuit does, to the point of the above quoted language.

The authority of the TVA Board to make by-laws, regulations, findings and determinations in the administration of its affairs under the Act has always been sustained. One of the early cases on the point was *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990 (6th Cir. 1940) cert. dend. 312 U. S. 701 (1941). This case was a determination of the power of the President to remove a director from the TVA board, the President having dismissed Arthur E. Morgan. Morgan contended that the President had no such right to remove a member of the board during the term for which he was appointed. The Court explained the position of the TVA Board as follows:

> "Many of these activities, prior to the setting up of the T.V.A. have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in nowise, different, except perhaps in degree, from the duties of any other administrative officers

> or agencies or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The board does not sit in judgment upon private controversies, between private citizens and the government, and there is no judicial review of its decisions except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department." 115 F. 2d at 994.

This has essentially described the position of the TVA Board for more than a quarter of a century. But one other very important point here to be considered is the fact that TVA does have a responsibility under the Act to make annual reports to Congress.[1] After these reports are made it is appropriate for Congress in maintaining its surveillance over the entire operation to question any administrative decisions it thinks proper. It is noteworthy that in August of 1966 the 89th Congress substantially amended the TVA Act. This amending act extends the borrowing authority of TVA from $750,000,000 to $1,750,000,000.[2] Neither in the reports made by TVA to the Congress nor in Congress's 1966 amendment of the TVA Act has any

[1] "The board shall file with the President and with the Congress, in December of each year, a financial statement and a complete report as to the business of the corporation covering the preceding governmental fiscal year." 16 U.S.C. § 831h(a).

[2] P.L. 89-537; 80 Stat. 346 (1966).

question been raised about the administrative determination herein held invalid by the 6th Circuit. Had Congress felt TVA had committed substantial violation of the 1959 amendment, surely it would have raised questions.

In the case of *TVA* v. *Kinzer,* 142 F. 2d 833 (6th Cir. 1944), the Court ruled upon a determination made by TVA's Board relative to the establishment of a retirement system for its employees. The Court said:

> ". . . the issues are: whether § 3 required regulations; whether the rules and regulations here in question are reasonably adapted to the administration of the act; and whether such regulations have received the legislative ratification that gives them the effect of law. If these propositions are answered affirmatively, the appellant must prevail." 142 F. 2d at 835.

The Court in the *Kinzer* case held that affirmative answers must be given to the questions and it said that continuing appropriations by Congress manifested congressional approval of administrative determinations made up to the time of the appropriation. The holding in the *Kinzer* case, we submit, is most important for the light it throws on the instant case. The Court there said:

> "The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the reenactment of a statute, the provision of which had, theretofore, been interpreted by regulations; they are deemed to have received Legislative

> ratification and thereby, to have become embedded in the law; and are to be given the same force and effect as the statute itself." 142 F. 2d 837.

Here in our case, applying the rule of the *Kinzer* case, we can say that TVA made five separate annual reports to the Congress since the administrative determination was made by the TVA Board on February 4, 1960 and prior to the adjudication of this case in the Court of Appeals. Also in this period of time Congress has amended the TVA Act to authorize TVA to raise a billion additional dollars. Clearly these factors establish Congress' tacit approval of the Board's administrative action in the meantime and thus that action by way of its interpretation on territory has become "embedded in the law" and is to be given the same force and effect as the statute itself.

The TVA Act gives the Board power to "adopt, amend and repeal by-laws" and to exercise "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation." 16 U.S.C. § 831(c). The Senate Committee clearly recognized this power and in putting together the final language of the 1959 amendment to the Act, that Committee commented:

> "The committee believes that the TVA Board would not be reckless in utilizing the authority to provide additional service, which actually amounts to less than 1 mile around the periphery of the predent area in which TVA power is used, and would properly use such authority to supply isolated communities and contiguous areas, exten-

sion into rural areas and expanded municipal areas, and minor necessary adjustments around the periphery and within the area in which power is now supplied.

"H.E. 3460, with the amendments proposed by the committee, does not change the basic administrative premise of the TVA Act. The TVA Board will continue to be held fully responsible by the Congress for the results of its operations, and it will have corresponding administrative authority in the discharge of this responsibility. The actions of the Board will be subject to annual review by the Congress." *Revenue Bond Financing by TVA*, Senate Report No. 470, July 2, 1959, p. 7.

Summarizing, then, we invite the attention of the Court to the fact that the TVA Financing Act does not change the pre-existing power of the TVA Board to make determinations in administering its affairs. We also ask the Court to note that the Senate committee in approving the 1959 amendment recognized these administrative powers and specifically states its understanding that the Board would make such findings. This, we submit, compels the conclusion that the Board acted properly. It implies the correctness of the District Court's holding in this case and the view of the dissenting Circuit Judge sustaining that action.

4. The Resolution of the TVA Board Defining Its Service Area Being Supported by Substantial Evidence Should Be Sustained.

The Court of Appeals in its opinion is unable to state definitely whether the judgment of the District Court was an independent finding of fact or amounted to an order sustaining the resolution of the TVA Board. The Circuit Court says:

> "The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to a finding of fact, we consider that it was clearly erroneous." ——F. 2d at ——, Appendix B, pp. 70, 71.

It also states:

> "We do not consider that the District Judge's recitation that:
>
> > " 'KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.'
>
> was a finding of fact that the Tazewells were 'islands.' " *Id.* at ——, Appendix B, p. 73.

If the Circuit Court is correct in its inference that the handling of the case by the District Court amounted to an affirmation of the finding by the TVA Board, then that finding is entitled to stronger presumption of support than if it were merely a finding of fact by the District Judge. FRCP 52(a) says in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Under this rule perhaps the leading case is the case of *United States* v. *United States Gypsum Company*, 333 U. S. 364 (1948). Mr. Justice Reed, speaking for the Court in this case gives the reason for the rule and extent of its applicability as follows:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies* or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate

> court. The findings were never conclusive however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.) 333 U. S. at 394, 395.

In the italicized portion of the above quote the Court by footnote cites the case of *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945). In the *Corn Products* case the Court sustains a finding of the Federal Trade Commission, saying:

> "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." 324 U. S. at 739.

It is natural for the courts to give special attention to findings of fact by administrative agencies operating under special statutes. Such agencies accumulate expertise in specific fields which goes beyond the more general experience of the courts.

Thus we submit that if the 6th Circuit can by a simple statement, in the face of undenied facts and documents, overturn a District Court which in turn sustained the finding of an administrative body, this then virtually destroys any rule or presumption of correctness of the original finding. It leaves the question as wide open to redetermination as if no administrative determination at all had been made in the first instance.

We strongly urge upon the Court that it would be impossible to administer TVA without the Board

making certain findings which in some instances require an initial interpretation of the TVA Act. We further submit that where those findings are based upon substantial evidence they must be sustained by the District Court as the District Judge here stated in his opinion. Finally since the 6th Circuit felt the discussion eminated originally and was bottomed upon the administrative determination, that determination is entitled to greater consideration and presumption of correctness than had it been a completely independent finding *de novo* by the District Court.

CONCLUSION.

Rule 19 of the Supreme Court gives indication of the character of reasons governing review by certiorari. In part that rule states that one important reason for review on a writ of certiorari is where the Circuit Court "has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings; or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." We submit that except for the reason of sanctioning "departure by a lower court," all of the foregoing reasons have direct and important application in the case at bar. The 1959 amendments to the TVA Act were an important addition of the federal law affecting one of the largest

agencies of the federal government. This Act has never before been judicially construed until this case. This alone we urge is sufficient reason for the Supreme Court to grant certiorari.

Moreover, the decision of the Circuit Court in this case is at great odds with previous decisions of the Supreme Court relative to the powers of the Tennessee Valley Authority.

Finally we think the Circuit Court's casual treatment of the rights of the people involved in the area, its unwillingness to consider the interest of the towns and its determination to treat this case as a simple fight between an investor company and TVA, constitute departure from the accepted and usual course of judicial proceedings. Another departure from the usual course of such proceedings is its complete readiness to upset an administrative determination based upon substantial evidence, affirmed by a District Court by the simple use of the words "clearly erroneous."

We, therefore, urge that writ of certiorari issue to the Court of Appeals in this matter.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on this 9th day of January, 1967, I served the foregoing Petition for Writ of Certiorari upon the parties by mailing a copy of the same to:

Solicitor General
Department of Justice
Washington 25, D. C.

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APPENDIX

APPENDIX

APPENDIX A

MEMORANDUM

(Filed October 15, 1964)

Plaintiff, Kentucky Utilities Company, hereafter referred to as KU, seeks injunctive relief against defendants, Tenneseee Valley Authority, hereafter referred to as TVA, Powell Valley Electric Cooperative, hereafter referred to as Powell Valley, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, to prevent them from taking or attempting to take its electric customers in the area of Tazewell and New Tazewell, Claiborne County, Tennessee, and also a judgment for damages for loss of business resulting from defendants' alleged wrongful acts.

Jurisdiction is based on 28 U.S.C. Sections 1331, 1332, 2201 and 2202.

The action against Mayors Hardin and DeBusk in their individual capacity was withdrawn during the trial.

KU seeks to enjoin TVA from selling or delivering electric power to Powell Valley, a distributor of TVA power, and enjoin Powell Valley from purchasing or receiving from TVA electric power for resale in either of the municipalities of Tazewell, Tennessee or New Tazewell, Tennessee, other than to customers and locations receiving electric service from Powell Valley on October 30, 1963. Relief is also sought against the Mayors of the two towns in their official capacities to prevent them from interfering with KU customer contracts.

Plaintiff contends that commencing in 1961 or 1962 and continuing to the present time, all of the defendants have combined and conspired and acted together to appropriate

to themselves all of the electric utility customers, business, revenues and contracts of KU for electric service within the two Tazewells, and that several dozen customers have been lost by KU as a result of the conspiracy.

The claimed overt acts consist of numerous meetings held by the representatives of defendants whereby plans were devised and carried out through acts commencing October 30, 1963 to take all of the business of KU in the two municipalities.

Plaintiff further contends that the TVA in furnishing electric power and in agreeing to furnish electric power to Powell Valley, which sells to the two municipalities and which has agreed to sell at retail to customers located in the corporate limits of the municipalities, violated 16 U.S.C. Section 831n-4 (hereafter called the 1959 TVA Act), which provides in pertinent part as follows:

> ". . . Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a

municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

The Act became effective August 6, 1959. It is to be noted that thereunder the TVA, except for specified exceptions, was not to contract for the supply of power "outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

KU insists that TVA was not the primary source of power supply in the areas of the two municipalities on July 1, 1957, within the meaning of the Act but that the municipalities were receiving electric service from KU on that date and on the date the Act became effective.

KU further contends that there was a common law conspiracy of the defendants to interfere with the contractual relations between it and its customers in the two municipalities by inducing such customers to terminate their contracts with KU in violation of the 1959 TVA Act.

TVA contends that plaintiff has no standing to maintain the action as the complaint presents no justiciable controversy: That KU does not have an exclusive franchise to furnish electric service in the municipalities and has no common law or statutory right to be free from competition of TVA and its distributors. That the 1959 TVA Act does not expressly confer upon KU the right to maintain an

action based upon alleged violations of the Act by TVA and, in the absence of such provision KU is without standing to bring the action.

TVA contends further that the findings of its Board that the two municipalities are within the TVA service area is not subject to judicial review if the finding was made in good faith and supported by substantial evidence and that the Board's action met these requirements.

TVA also contends that it has made no contract since the effective date of the Act which would have the effect of changing the relationship of TVA or its distributors with respect to the source of power supply in the two municipalities.

TVA says that it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957 within the meaning of the 1959 TVA Act.

TVA denies that it unlawfully induced or combined to induce customers of KU to terminate, breach or sever alleged contracts with KU for electric service.

TVA asserts that the citizens of Tazewell and New Tazewell, Tennessee have a right to obtain electric service from whomever they please and that KU has no right to be free from lawful competition.

The two Mayors, and the municipalities which they represent, adopted the contentions made by TVA and in addition they point out that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities. They assert that the municipalities have the right under the Tennessee law to establish their own electric systems and that the citizens acting through ther elected officers have the right to choose between the TVA current and the current furnished by private institutions.

The defenses of Powell Valley to the complaint are the same as the other defendants insofar as applicable.

Standing of Plaintiff to Maintain Action

If plaintiff has proved the charges of common law conspiracy and a violation of the 1959 TVA Act and has sustained injuries therefrom, it has standing to maintain the suit. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537, cert. denied, 358 U. S. 830 (C. A. 6); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.* (D.C. Cir), 323 F. 2d 290, cert. granted, 376 U. S. 948; *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, affirmed 278 F. 2d 871 (D.D.C.).

The cases cited by TVA of *Alabama Power Company* v. *Ickes*, 302 U. S. 464, *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118 and *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924, are distinguishable from the case under consideration. Each of these cases involved a suit by a private utility to enjoin officers or agencies of the United States from making contracts which would have the effect of increasing competition between the private retailer and the public power agencies. The public power agencies' competition was legal in itself, but was attacked on the basis that either the statutes authorizing the activities of the various officers and agencies were unconstitutional or that the officers and agencies had exceeded their authority under the Act. In each case, it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise; hence, no common law or statutory rights of the plaintiffs had been invaded. The plaintiffs, therefore, had no standing to question the authority of the various officers and agencies of the United States.

In *Alabama Power Company* v. *Ickes, supra*, the Court likened the position of the plaintiffs to that of a taxpayer suing to enjoin the expenditures of federal funds, which could not be done under the decision of *Massachusetts* v. *Mellon*, 262 U. S. 447. The distinction in these cases is that

the competition was shown to be legal while in the case under consideration it is claimed that the competition is illegal by reason of the unlawful conspiracy and the alleged violation of the 1959 TVA Act. See: *Texas & P. R. Co.* v. *Rigsby,* 241 U. S. 33, 39-40; *Wheeldin* v. *Wheeler,* 373 U. S. 647; *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195, cert. denied, 365 U. S. 814; and *Dann* v. *Studebaker-Packard Corporation* (C. A. 6), 288 F. 2d 201.

Findings of TVA Board Subject to Judicial Review

The TVA Board on August 26, 1964, some three weeks before the trial, found and determined that all of Claiborne County, Tennessee (within which County the two municipalities are located) is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The TVA was first contacted by the Claiborne County Chamber of Commerce in 1961 for power. One or more members of the TVA legal staff was present at this meeting. The representatives were advised by TVA that there was a legal question as to whether TVA power could be supplied in the municipalities under the 1959 TVA Act and that a court decision would be helpful in resolving the question. Mr. Wessenauer testified in a discovery deposition that the TVA lawyers had advised him that under the Act TVA power could be supplied in Tazewell and New Tazewell and that so far as he was concerned that was the end of it. He also testified that the TVA left it up to the distributors to determine that they were staying within the boundaries set by the 1959 Act and that he thought this was a factor that should be taken into consideration by the TVA Board in determining the TVA area. He stated that if he were fixing the lines he would wipe out the pockets inside the TVA service area. That

he had not been advised as to the provisions of the Act with respect to "islands."

The factual presentation of Mr. Wessenauer, supplemented by the opinion of Mr. McCarthy, Chief Counsel, and its independent study, caused the Board to conclude that the two towns were within the TVA service area on July 1, 1957.

The issue before the Board was one of fact and law. Proper interpretation of the 1959 Act was the law issue, and the determination of the area supplied by TVA and the area supplied by other sources was the issue of fact.

It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra; Civil Aeronautics Board* v. *Delta Air Lines*, 367 U. S. 316.

The case of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, cited by the defendants involved the Walsh-Healy Act which expressly provided for hearings to be held by the Secretary of Labor at which evidence would be introduced and on the basis of that evidence a wage determination would be made. The question of the size of "localities" was necessarily one of the subjects upon which the Secretary was required to act in each case and make a determination. The decision by the Secretary was a decision of Congress made by delegated authority.

Another case cited, *Re U. S. ex rel. TVA* v. *Welch*, 327 U. S. 546, 554, is distinguishable from the present case in that the discretionary power to determine what lands should be condemned is expressly provided by the TVA Act. Title 16 U.S.C. 831x.

United States v. *Carmack*, 329 U. S. 230, 242-243, involved the selection of sites to be condemned for post offices. The Court noted that within its legislative power, Congress had the right to choose or reject the proposed post office site by direct action.

Conspiracy Charge

In support of its charge of conspiracy, KU contends that when the question of TVA power for the two municipalities was considered in 1961, TVA doubted that its power could be distributed in the municipalities without violating the 1959 Act and that a court decision should be obtained to clarify the issue. It was made clear by representatives of TVA and Powell Valley at this meeting that Tazewell and New Tazewell could not feasibly establish an electric system of their own but would have to depend on Powell Valley.

After the initial consideration of this question, KU contends that TVA officials cooperated in a move by the Chamber of Commerce and the two municipalities to buy TVA power for Tazewell and New Tazewell without getting a court construction of the Act. From that point on, various problems, in addition to the territorial limitations contained in the 1959 Act, were encountered.

KU asserts that it was known that KU would not voluntarily sell its facilities in the area of the municipalities and that the defendants planned to use various forms of threats and duress upon KU to force the sale of its facilities. That it was planned to use the Tennessee Public Service Commission as a lever to force the reduction of KU's rates in the area and to use threats to duplicate the KU system by a parallel system.

It further contended that Powell Valley was known to be the only feasible agency to supply TVA power in the two Tazewells from an economic standpoint but was blocked from doing this for several reasons: First, there was an agreement between Powell Valley and KU as to the boundaries to be served by these utilities. The 1959 Act encouraged such agreements. After several meetings of the defendants in 1961 and 1962, Powell Valley gave notice of termination of the 1958 agreement between it and KU to be

effective in 1963. The 1952 agreement between KU and Powell Valley which prevented the taking of each other's customers could not be terminated according to its terms without terminating the whole tri-party agreement under which KU supplied power into the Tazewell and New Tazewell area for its own customers and also for use by Powell Valley. This was an advantageous arrangement to Powell Valley and termination was not desired.

KU asserted that REA had a policy against duplicating facilities and the use of funds of the cooperative borrower for the construction of duplicating facilities.

That Powell Valley feared that if KU was pushed out of the Tazewell and New Tazewell area, KU itself might terminate the 1952 tri-party agreement under which KU supplied power to TVA for use by Powell Valley. If this should happen, Powell Valley customers in the area would be left without a source of TVA power. TVA put to rest this fear when the TVA Board promised that some source of power would be supplied if the parties moved along with the plan and supplanted KU in the area.

That because of many problems, a decision was made by defendants to use a so-called municipal system initially to displace KU in Tazewell and New Tazewell and the surrounding area. It was recognized that a municipal system was not feasible but that it might be utilitized as an initial arrangement to displace KU, after which Powell Valley would take over. Powell Valley service lines were to be used in getting its service to this small initial municipal system. While the two cities were carrying on the so-called municipal system, Powell Valley would actually do the operating, meter reading, and servicing.

It was KU's contention that TVA and Powell Valley suggested that the Mayors of the two cities present resolutions under which the Board of Aldermen of the cities simply turned the whole matter of establishing and operat-

ing this system or systems over to the Mayors to handle as the course of expediency dictated.

That in October, 1963, Powell Valley's contractor and engineer, acting under ostensible contracts with the Mayors, moved in and started disconnecting KU's customers who were induced by the foregoing arrangement to switch, and connected them to Powell Valley's lines. The municipal system that was thus constructed consisted largely of drop service lines to individual customers, which lines were connected to the nearest lines of Powell Valley. In several instances, one or more poles and a transformer were required to connect the customers to Powell Valley lines. After twenty-four customers of KU were appropriated, this action was instituted and the further taking of customers ceased. The contractor discontinued his work for the municipalities.

In the Court's opinion the evidence fails to show a conspiracy upon the part of any of the defendants. The evidence shows that the retail rates for electricity to residential and commerical customers in effect for KU prior to the institution of this suit were substantially higher than those for the TVA power distributors, and under applicable rate schedules the disparity increased with increased use. As a consequence, some of the witnesses testified that within the two towns the value of properties served by TVA electricity was substantially and uniformly higher than similar properties served by KU. The rate disparity created discontentment among some of the residential and industrial consumers and a number of citizens of the two towns appealed to their civic leaders and to their elected officials to explore the possibility of lower cost electricity. Numerous meetings were held among representatives of the municipalities, Powell Valley, TVA and various civic groups to see what could be done towards getting TVA power beginning in 1960. At these meetings, TVA representatives advised that TVA could not enter into a power

contract with either of the municipalities because they were so small that it would not be economically feasible for them to build and maintain their own separate distribution system and undertake the responsibilities of a TVA distributor. The representatives of the towns were advised to discuss their problems with Powell Valley to see if suitable arrangements could be made to obtain their electricity from Powell Valley.

Powell Valley advised the municipalities that it would be unable to obtain REA financing for construction of duplicating distribution lines within the towns and, therefore, the towns would have to buy or build their own systems.

At a meeting with the TVA Board of Directors, the Board advised representatives of Middlesboro, Kentucky and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. This advice was confirmed at a meeting on November 27, 1962, at which time TVA gave representatives of the towns and Powell Valley assurance that the two towns were within the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA would continue to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area.

The municipalities then sought technical assistance and advice from the Legal Consultant on Municipal Law at the University of Tennessee as to how they might go about financing their own municipal electric systems. They employed an attorney who specialized in this field to advise and consult with them. After considering the advice and suggestions given them, to two towns, through their authorized officials, circulated a petition to the citizens of the towns to determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the

towns of their own municipal electric systems. Following the circulation of these petitions, the two councils passed resolutions on October 21, 1963, authorizing the Mayors of the two towns to take the necessary steps to purchase or build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing of the customers in the name of the two towns. Powell Valley was to sell electricity to the two towns at wholesale rates plus a small charge for transmitting the electricity, and it was also agreed that the rates charged the city customers would be no higher than those charged by Powell Valley to its customers under its contract with TVA.

Beginning in October, 1963, a number of residents of the two towns who were then receiving service from KU made application to the towns for electric service and notified KU to discontinue service to them and to disconnect their meters. On October 31, 1963, until the filing of this suit on November 7, 1963, eighteen former customers of KU had terminated their service with KU and became customers of the two towns.

The towns of Tazewell and New Tazewell have a legal right to own and maintain their own municipal electric systems and have a right to compete with KU for the customers in those towns and the offering to serve those customers at lower rates than those charged by KU did not constitute an unlawful interference with the customer contracts of KU in the absence of fraud. The evidence fails to show any fraud upon the part of any of the defendants.

86 C.J.S. *Torts*, § 44c (1954); Annot., 84 A.L.R. 63 (1933); Annot., 26 A.L.R. 2d 1259 (1952); *Fairbanks, Morse & Co.* v. *Texas Electric Service Co.*, 63 F. 2d 702 (C. A. 5, 1933); *Citizens' Light, H. & P. Co.* v. *Montgomery Light & W. P. Co.*, 171 Fed. 553 (M.D. Ala. 1909); *Wolf* v. *Perry*, 339 P. 2d 679 (N.M. 1959); *Emery* v. *A. & B. Commercial Finishing Co.*, 315 P. 2d 950 (Okla. 1957); *Augustine* v. *Trucco*, 268 P. 2d 780 (Cal. App. 1954).

The consumers in Tazewell and New Tazewell who have discontinued their service with KU had a legal right to discontinue such service and to take service from the municipalities. *Cass County Electric Coop.* v. *Otter Tail Power Co.*, 93 N. W. 2d 47 (N.D. 1958); *Blue Ridge Elec. Membership Corp.* v. *Duke Power Co.*, 128 S. E. 2d 405 (N.C. 1962).

Was TVA the Primary Source of Electric Power in Tazewell and New Tazewell on July 1, 1957?

KU contends that the area for which TVA or its distributors were the primary source of power supply on July 1, 1957 is the actual geographical area where the distribution facilities and customers of TVA and its distributors were located on that date; that if other utilities were the actual source of power, such areas were excluded from the TVA areas although they may have been wholly or partially surrounded by areas for which TVA or its distributors were the actual source.

KU argues that if a perimeter is to be drawn defining primary service area, the location of such perimeter can be properly fixed only by such facts as the facilities, customers and the rendering of service. Where adjacent service areas of private utilities form peninsulas or corridors or other indentations into the service area of TVA, such perimeter must follow these factual service areas and thereby exclude such peninsulas or corridors from the primary service area of TVA.

KU insists that all of the maps filed in evidence show that TVA or its distributors were not the primary source of power in these municipalities on July 1, 1957, and that a dozen TVA maps in evidence draw the continuous perimeter of TVA's primary service area so as to dip down into Claiborne County south of Tazewell and exclude, from TVA's area, KU's service area extending down from KU's adjoining service area in Kentucky. Thus, it argues, TVA's primary service area does not include, and cannot lawfully be described so as to include these peninsulas of established service of adjacent private utilities.

KU has insisted that on July 1, 1957 there were in excess of 70 municipalities served by private power companies, which were entirely surrounded by TVA service and that these islands or pockets of private power service were referred to in the legislative history of the 1959 Act. KU contends that it is inconceivable that anyone could conclude that TVA was the primary source of power supply within these municapilities on July 1, 1957 or that these municipalities could be considered in the area for which TVA was the primary source of power supply on such date.

TVA asserts that these 70 municipalities which plaintiff refers to as being within the primary area are mostly small unincorporated communities which are not municipalities at all. 62 C.J.S. *Municipal Corporations*, § 1d (1949).

KU points out that the fact that TVA's distributor, Powell Valley, on July 1, 1957 supplied 16 customers in KU's defined service corridor in Claiborne County outside of Tazewell and New Tazewell, and 28 customers within the towns, does not affect the conclusion that KU was the primary source of power supply in the defined corridor including the two towns. That Congress recognized that there might be areas where TVA distributors supplied some customers but were not the primary source of power supply. Such areas, it argues, including the KU corridor

and the two towns, therefore, are not part of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

Both TVA and KU recognized that the territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Committees of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the primary area where the TVA or its distributors had generally established electric service on July 1, 1957.

The statute provides in part:

> ". . . the Corporation shall make no contracts . . . making the Corporation or its distributors . . . a source of power supply outside the area for which the corporation or its distributors were the *primary source of power* supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area . . ." (Emphasis added.)

and that

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had *generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.*" (Emphasis added.)

The Court had grave doubt during the trial as to whether the last quoted paragraph referred to the primary area, but is now convinced that it refers to the area in which TVA had established electric service outside of the 80,000 square mile primary area and the additional five mile strip.

The words "Nothing in this subsection shall prevent" appears to be an additional grant of power to serve an area not covered by the preceding paragraph relating to the primary area and the five mile strip, rather than a limitation on the power to serve the primary area.

If the statutory language is clear, it may be given effect in accordance with its provisions without resort to legislative history. *Caminetti* v. *United States,* 242 U. S. 470, 485; *Osaka Shosen Line* v. *United States,* 300 U. S. 98; *U. S.* v. *Oregon,* 366 U. S. 643, 648. But the legislative history supports what we believe to be a logical reading of the language of the Act.

We are told in the briefs that the Senate passed a bill in 1957 which would have permitted TVA to serve the whole of any county lying partly within TVA's existing service area or the Tennessee Watershed, which would have permitted an increase in the area served by TVA from 80,000 to 105,000 square miles. That the bill passed by the House in 1959 would have limited TVA to its existing service area. That the task before the Senate in 1959 was to work out a compromise between these two proposals.

The report of the Senate Committee rejected the term "service area" because it was "nebulous" and because some of the members felt that it would prevent TVA distributors from serving "small areas served by private power entirely surrounded by the lines of TVA's distributors" and "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."[1]

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[1] "Under the original TVA Act, Congress provided that the area in which TVA power should be made available would be deter-

(Footnote continued on following page)

Senator Randolph expressed the view that TVA should be encouraged to serve any islands that existed within its geographical operating area as it existed on July 1, 1957.[2]

Senator Randolph and Senator Talmadge sponsored the territorial amendment which was adopted on the Senate floor. If Senator Randolph believed that TVA should be encouraged to serve islands of private power company service within its operating area, it is not likely that he would have sponsored an amendment whose language prevented TVA from rendering service within the primary area.

Senator Cooper objected to the provisions of the Randolph-Talmadge amendment prohibiting service in a

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mined, first by the desire of the people, and second by the economic and engineering feasibility of providing service. The term "service area" is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers. Although there has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. Others believed, however, that the stabilization area should be defined and limited by law.

* * * * * *

". . . The area where each distributor sells power is determined by community growth and the relationship between neighboring distributors. Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

"The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds of TVA." [From Report of Senate Committee, H. R. 3460, Report No. 470, pp. 8, 9].

[2] "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." [Supplemental views of Mr. Jennings Randolph on H. R. 3460, p. 56].

municipality outside its primary area of service as he felt that small municipalities near the periphery should be allowed to obtain TVA power. He apparently had no question about its authority under the amendment to serve municipalities inside the periphery.[3]

Representative Davis, the House floor manager for the bill, when explaining the effect of the Senate version stated that the Senate bill drew a line around the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.[4]

Statements of sponsors of the bill rather than opponents are usually looked to for legislative history. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 395; *Duplex Co.* v. *Deering*, 254 U. S. 443, 474-75.

Representative Vinson, an opponent of the bill, felt that the territorial limitations in the Senate bill were more

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[3] "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." [105 Cong. Rec. 13052].

* * * * *

"I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.

"Nevertheless, if my motion to strike shall be defeated, I will vote on final passage for the bill, because I have sponsored self-financing from the outside. I respect the service of private utilities in my own State. I have stood for the right of the people in small communities and cooperatives near the TVA area to have some voice in their choice of power supply." [105 Cong. Rec. 13053].

[4] "As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area." [105 Cong. Rec. 14114 (1959)].

generous to TVA than that of the House bill, but he felt that the limitations in the Senate bill could be justified.[5] He recognized that TVA would have full authority to supply the full power requirements of the primary area.

Representative Scherer, an opponent of the bill, understood that TVA could serve areas already receiving power from another source.[6]

The maps filed as exhibits in this record, Exhibits 94, 95 and 96, and used by TVA witnesses before the Congressional Committee, show that Claiborne County was within TVA's primary service area. One of the maps was presented by KU (Ex. 92) which showed all of Claiborne County in the primary area except a small mountainous part. However, KU filed another map, Exhibit 100, which shows that the Tazewells were served by KU. This map

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[5] "While the territorial limitation by the Senate is more generous to TVA than that of the House, I believe it can be justified. I think, therefore, it is safe to say that this amendment proposed and adopted by the other body, if adopted by the House and enacted into law, will provide a fair and reasonable limitation under which TVA will be allowed to increase its power generating capacity to meet the increased requirements within the area delineated by the amendment, and at the same time give reasonable protection to the privately owned systems, and their investors, and to the municipalities and other governmental organizations dependent upon the privately owned systems as an indispensable source of tax revenue." [105 Cong. Rec. 14122 (1959)].

[6] "However, the total area of such 5-mile extension beyond the present periphery greatly exceeds the 2½ percent or 2,000 square mile limitation provided by the Senate bill. Therefore, TVA during the next few years can pick and choose as it sees fit in this 5-mile extended area such spots as it desires until the 2½ percent or 2,000 square miles have been reached.

"One can readily see that in some places the present periphery will not be extended at all. In other places it may be extended 1 mile beyond the present periphery; in other places, 2 miles or 3 or 4 miles. TVA will pick and choose the best and most lucrative spots in this 5-mile area whenever it gets around to it. In the meantime, private power companies certainly will hesitate to extend their service to anyone within the 5-mile area because there will be no assurance that TVA might not the next day decide to take over that particular area." [105 Cong. Rec. 14125 (1959)].

also shows facilities of KU, including transmission lines that run from Bell County, Kentucky, southeast through the two Tazewells. KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps shows that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.

As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service.

During the month of June, 1957, in Tazewell, KU supplied 118,737 KWH of electricity while Powell Valley supplied 11,368 KWH, and in New Tazewell KU supplied

116,645 KWH compared to 3,024 KWH supplied by Powell Valley. Considering the two towns together, KU supplied a total of 235,382 KWH to Powell Valley's 14,392 KWH. KU thus supplied 94.2% of the KWH of electricity consumed in these two towns during June, 1957. During the month of July, 1957, in Tazewell KU supplied 106,647 KWH to Powell Valley's 11,410, and in New Tazewell KU supplied 121,440 KWH to Powell Valley's 3,356. In the two towns, KU thus supplied 228,087 KWH during this month to Powell Valley's 14,766 KWH. In July, 1957 KU thus supplied 93.9% of the electric energy consumed in the two towns.

On August 6, 1959, the day the Act became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31.

As of July 1, 1957, KU supplied electric energy to 1,278 customers outside of the municipalities. In 1963, a 34.5 KV transmission line of KU was rebuilt to a 69 KV which is now owned, maintained and operated by KU within this corridor of KU's service area.

On October 30, 1963, the customers of TVA suppliers had increased to over 100 in the municipalities.

The town of Tazewell was incorporated on November 17, 1954 and the town of New Tazewell was incorporated on November 19, 1954. KU and its predecessors had been serving the incorporated areas at least as early as 1920.

In 1952, prior to the enactment of the TVA Act of 1959, KU, TVA and Powell Valley entered into an agreement with respect to means of supplying the loads of KU and Powell Valley. Powell Valley had been serving Claiborne County since 1940. KU and Powell Valley by letter agreement on January 8, 1958, agreed that neither party would serve any customer at any given location, which location was taking service from the other party; that any new load

would be served by the party whose facilities were closest to the load and that the parties would consult with each other in an honest effort to resolve any differences on an equitable basis. The letter agreement provided it should remain in effect for a period of five years and should continue from year to year subject to the right of either party to terminate at the end of any annual extension.

Maps were prepared defining the respective areas. For a number of years, the maps were used to resolve questions which arose as to service to particular customers. This agreement was terminated by Powell Valley some time in 1962 or 1963.

The TVA Board of Directors on August 26, 1964 made an offiical and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.

The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

The finding of the Board was made in good faith and supported by substantial evidence.

The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson,* 127 F. Supp. 400.

None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint.

/s/ Robt. L. Taylor
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 16491

KENTUCKY UTILITIES COMPANY,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
POWELL VALLEY ELECTRIC CO-OPERATIVE,
EDWARD J. HARDIN, individually, and as Mayor of Tazewell, Tennessee, and
JAMES B. DEBUSK, individually, and as Mayor of New Tazewell, Tennessee,
Defendants-Appellees.

APPEAL from the U. S. District Court for the Eastern District of Tennessee.

OPINION—Decided November 15, 1966.
(Filed November 15, 1966)

Before: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This is an appeal from a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, dismissing a com-

plaint for injunctive relief. Plaintiff-appellant, Kentucky Utilities Company, a Kentucky Corporation (hereafter KU) had sought to have Tennessee Valley Authority (hereafter TVA), Powell Valley Electric Cooperative, a TVA distributor (hereafter PVA), and the respective mayors of the cities of Tazewell and New Tazewell, Tennessee, restrained from taking over KU's electric customers in the area of Tazewell and New Tazewell, and generally to restrain TVA and PVA from taking over the supply of electric power to those Tennessee cities.

KU's asserted ground for relief was its claim that it was and had been, before and after July 1, 1957, the primary source of electric power to the consumers in the Tazewells; that in 1963 and prior thereto the municipal authorities of the Tazewells made plans and "conspired" with TVA and PVA to introduce additional TVA power into the area and had commenced to take over KU's customers; and that all of such plans and conduct were and would be violative of an amendment added in 1959 to the Tennessee Valley Authority Act as Section 15d thereof (Public Law 86-137; 73 Stat. 280), which in subsection (a) provides that,

> "Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* * * *." (Emphasis supplied.) Title 16 U.S.C.A. § 831n-4(a).[1]

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[1]The 1959 Act authorized TVA to issue and sell bonds in an amount not exceeding $750,000,000 outstanding at any one time, "to assist in financing its power program," but burdened such

(Footnote continued on following page)

On the critical date, July 1, 1957, KU and PVA were both supplying power in the involved municipalities, but KU supplied 561 customers out of a total of 589, or 95.3% thereof, PVA serving the remaining 28 customers. In the month of June, 1957, KU supplied 228,087 KWH of electricity out of a total 242,853, or 93.9% thereof, PVA supplying the balance of 14,766 KWH. As found by the District

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authority with defined restrictions. We consider that only that portion of the restrictions quoted above is relevant here, but both litigants claim support for their respective positions in the various provisos that follow the quote. We set out the entire restrictions as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof."

Judge, "On August 6, 1959, the day the Act in question became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell, KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31." It was the contention of KU that the foregoing and other evidence established that the cities of Tazewell and New Tazewell were "outside the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957," and that TVA and PVA were forbidden additional entry into the area. In defense, TVA and PVA asserted that the basic "area" should not be limited to that part of Tennessee in which KU was the primary source of power, but should encompass that larger portion of Tennessee, including all of Claiborne County, in which TVA and its distributors were in total the primary source of power. In Claiborne County, in which the Tazewells were located, two TVA distributors, PVA and the City of LaFollette Electric System, were suppliers. KU also supplied power outside of the Tazewells along a corridor extending into Tennessee from an area of Kentucky wherein KU was also the primary, if not the exclusive, source of power. While PVA and LaFollette Electric System together may have exceeded KU in customers and power delivered, KU was the largest single source of power supply in the whole of Claiborne County. The District Judge found that in Claiborne County:

> "As of July 1, 1957 Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In

the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,-947.93." 237 F. Supp. at 513.

There was evidence that KU was also the primary source of power in the area of its corridor outside of the Tazewells and that its corridor had total area of about 60 square miles.

The meritorious issue before the District Judge was whether, as contended by KU, and within the meaning of the 1959 Act the cities of Tazewell and New Tazewell were outside the area wherein TVA or its distributors were the primary source of power on July 1, 1957.[2] In addition to their defense on the merits, defendants-appellees pleaded that plaintiff lacked standing to maintain the action. The District Judge concluded that plaintiff had standing to sue but held for defendants on the merits. *Kentucky Utilities Company* v. *Tennessee Valley Authority*, 237 F. Supp. 502 (E.D. Tenn. N.D. 1964).

Defendants-appellees reassert here their defense that plaintiff was without standing to sue, and ask that the judgment of dismissal be affirmed on such ground, regardless of the merits. We defer threshold discussion of this question, believing that the reasons which prompt our disposition of it will be more clearly exposed by our consideration of the merits.

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[2]Plaintiff's complaint also charged all defendants with conspiracy to illegally deprive it of its property in the area in question. The District Judge dismissed this claim and it is not presented by the appeal before us.

We sustain the District Judge's denial of the standing to sue defense, but reverse the judgment which dismissed the cause on the merits.

There is little controversy over the essential and dispositive facts, although the litigant adversaries differ as to their significance. Plaintiff Kentucky Utilities Company is an investor-owned electric public utility, serving customers in about two-thirds of the State of Kentucky, in Claiborne County, Tennessee, and through a subsidiary, in four counties in southwest Virginia. Its transmission lines serving this entire area constitute an integrated and continuous system, and all parts of the area served are substantially continguous. Its Claiborne County, Tennessee, area begins at an area served by it in the State of Kentucky, adjacent to that state's southerly line and then extends along and within a peninsula or corridor into Claiborne County, Tennessee, 15 or so miles to include the cities of Tazewell and New Tazewell. The record before us leaves us uncertain as to the exact width of this corridor and indeed at one point its width and contiguity with the adjoining area may be limited to the dimension of a transmission line at a point where a transmission line of PVA crosses it. This KU corridor is bounded on the east, south and west by TVA distributors and on the north by the main area served by KU itself.

KU's activity in the above area began as early as 1919 and from 1920 it has been serving customers in Tazewell and New Tazewell, which localities became incorporated as cities of Claiborne County in 1954. KU has a non-exclusive franchise to provide electricity to customers in all of Claiborne County. The fixed corporate limits of Tazewell and New Tazewell define the area in which KU on July 1, 1957, was the primary source of the electric power consumed therein. Beginning in 1961 and 1962, citizens and officials of Tazewell and New Tazewell were attracted to the ap-

parently lower rates of PVA,[3] which is a distributor of TVA power in adjacent areas and with the few customers in the Tazewells above referred to. After meetings between representatives of these cities and of Claiborne County with TVA and PVA officials, the two towns decided to set up municipal electric systems which would purchase power from PVA at wholesale rates and re-distribute it. The cities' offer to buy the facilities of KU was refused. Activity toward establishing a municipal system then began, but up to the start of this lawsuit this activity consisted of disconnecting KU's line to several of its consumers and reconnecting them to PVA.

This case was started on November 7, 1963, and any activity thereafter by PVA and TVA in the Tazewells has been suspended in obedience to an order of the District Court.

1. *The merits.*

The meritorious and controlling question is whether Tazewell and New Tazewell were "outside the area for which the Corporation [TVA] or its distributors were the primary source of power on July 1, 1957."[4] The litigants' pleadings presented issues of fact and law to the District Judge, but as discussed hereinafter we do not consider that there was a real controversy over the basic facts. Decision of the case involves determination of the relevant "area"

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[3]KU contends that, properly analyzed, its rates are not less economical to their customers than PVA rates. Resolution of this question, however, is not necessary to our decision.

[4]We need not consider whether, consistent with the 1959 Act, the Tazewells were part of an "additional area extending not more than five miles around the periphery of such area as may be necessary to care *for the growth of the corporation and its distributors within said area.*" (Emphasis supplied.) Neither TVA nor PVA contends that taking over the power distribution in the Tazewells is necessary for the growth of TVA within the area contiguous to the Tazewells if the Tazewells are actually outside of the area for which TVA or PVA were the primary source of supply on July 1, 1957.

within which TVA or its distributors constituted "the primary source of power supply on July 1, 1957." If the relevant area does not include the towns of Tazewell and New Tazewell, then TVA and PVA were, by the 1959 Act, foreclosed from making further contracts for power supply therein. TVA's position that "it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957" is supportable only if it is permitted to dilute KU's clear primacy in the Tazewells by detaching them from KU's total and contiguous area of service and making them an integral part of territory in which TVA was dominant. On August 26, 1964, after the issues had been drawn and shortly before trial, the TVA Board of Directors adopted the following resolution:

> "That the Board of Directors hereby finds and determines that all of Claiborne County, Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Numerous maps put in evidence showed that KU's corridor into Tennessee was contiguous to its larger area of service in Kentucky and Virginia which admittedly was no part of TVA's service area. The TVA Board's resolution determined that the *periphery* of its area of primary power supply was along the easterly line of Virginia and the southerly line of Kentucky, thus cutting off KU's corridor of power supply in Tennessee from the balance of its area of service. The Board resolved:

> "That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee [Campbell County abuts on Claiborne on the west] is part of the periphery of the area

for which TVA or its distibutors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee."[5]

We consider that the District Judge's conclusion was bottomed primarily upon his acceptance of the TVA resolution as dispositive of the case. His opinion recites:

> "The finding of the Board was made in good faith and supported by substantial evidence.
>
> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson*, 127 F. Supp. 400."

(a) Legislative history.

Examination of the legislative history of the 1959 Act has helped our resolution of the question before us. In 1955, TVA was faced with the prospect of rapidly increasing demands for power for its existing customers. It sought a way to meet the cost of new facilities without dependence upon annual national budget considerations. It suggested that Congress give it the power to issue bonds to private and public investors to finance the development. In this effort Senate Bill 2373, 84th Congress, 1st Session (1956) was introduced. This bill contained no territorial limits to the expansion that TVA could accomplish with the proceeds

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[5]KU contends that the periphery of the area in which TVA was the primary source of supply should follow the lines which mark the outer limits of such area and in this case it should have dipped down into Tennessee so as to exclude the corridor in which KU was the primary source of power supply.

of the bonds. Gabriel O. Wessenauer, Manager of Power for TVA, spoke for it before the Congressional Committees which considered legislation that was proposed. He made it clear that territorial expansion was not contemplated, but that TVA sought power and finances to insure sufficient capacity to accommodate the growth of the system load. *Cf. Hearings, Senate Committee of Public Works,* 84th Congress, 1st Session, S 2373, pp. 65, 79 (1956). The Committee understood this to be TVA's limited objective. Senator Cotton remarked, "Its [TVA's] purpose is to have growth rather than expansion in that you may have more electricity, more power to serve the territory that you presently serve." Id. at 114. At the time this legislation was under consideration, the area served by TVA and its distributors had more or less stabilized; this area comprised all of the State of Tennessee except the peninsula or corridor involved here (and some other areas not of materiality here) as well as parts of Kentucky, Virginia, Georgia, Alabama and Mississippi bordering on Tennessee. The history of troubles and collisions between TVA and private power companies was of course known to Congress, but a degree of repose had existed for some time. Congress, as the source of money, had exercised power over TVA's geographic growth, but possession by TVA of authority for self-financing might indeed call for substitute controls upon its expansion. S 2373 was never passed, and two years later, in 1958, two new bills, HR 3236 and HR 4266, 85th Congress, 1st Session, were proposed. These bills also made no provision for any territorial limitations. This was a cause of concern to some members of Congress. A typical inquiry was, "Can the TVA Directors issue bonds to expand its area outside of the district now covered by TVA?" An answer was made, "* * * there has not been a single instance in the history of this Committee in which the Tennessee Valley Authority has gone in to 'raid' any

utility's territory." *Hearings, House Committee on Public Works,* 85th Cong. 1st Sess., HR 3236 and HR 4266, p. 16 (1958). TVA's Wessenauer added "We have not run any parallel lines for 10 to 20 years." *Id.* at 94. A statement by a representative of the private power companies that the bill posed the "threat of geographic as well as capacity expansion" was dismissed by a supporter of the bill as the raising of an old "bogey." *Id.* at 156-159.

After the above bills failed of enactment, four new ones were introduced into the Senate: S 1855 which proposed to limit TVA to its "service area" as of July 1, 1957; S 1869 which merely required TVA to allow Congress 60 days to veto any proposed expansion before beginning it; S 1986 which would have limited TVA to replacing existing facilities; and S 2145 which would have required congressional approval for any expansion. Although none of these bills became law, it had become apparent that definition and imposition of some limitation on TVA growth was going to have to be a part of any successful bill.

In 1959, H.R. 3460, which ultimately became the 1959 TVA Act, was introduced. As offered, this bill would have limited TVA to "counties lying in whole or in part within either the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957." During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accomodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *cf Hearings, Senate Committee on Public Works,* 86th

Cong., 1st Sess., S 931 and H.R. 3460 pp. 39-51 (1959); between the Georgia Power Co. and TVA, *Id.* at 220, and indeed in our own case between KU and PVA.[6] Rep. Vinson stated that his amendment "writes into the law the 'gentlemen's agreement.'" *Hearings,* 86th Cong., 1st Sess., *House Committee on Public Works,* H.R. 3460, p. 111 (1959).

Three months later, H.R. 3460 was before the Senate Committee, together with S 931, a bill which more or less conformed to the version of H.R. 3460 originally submitted to the House Committee. The threat of possible expansion of TVA under S 931 excited numerous and vigorous protestations from representatives of power companies, whose statements consume some 70 pages of the report. *Senate Committee on Public Works,* 86th Cong., 1st Session, S 931 and H.R. 3460, pp. 170-240 (1959). Ultimately, S 931 was rejected, and H.R. 3460 was reported out and passed.

In the Senate report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:

> "Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this

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[6] In 1958 a written agreement was made between KU and TVA's distributor, PVA. Fairly read, this agreement provided that KU and PVA would mutually avoid "raiding" customers in their respective areas. To insure understanding and delineation of such areas, engineer representatives of KU and PVA collaborated in the preparation of a map which, upon its completion in 1960, showed the Tazewells as part of the territory in which KU was the primary source of power. After the activity to have additional TVA power brought into the Tazewells, PVA gave notice of termination of its 1958 agreement with KU. With reference to some new projects then contemplated for the Tazewells, a TVA District Manager, on October 18, 1962, recited in a memorandum to TVA's Director of Power Marketing that "Under the territorial agreement between the Cooperative [PVA] and KU, effective January 16, 1958, *both of these projects are in KU's territory.*" (Emphasis supplied.)

area was satisfactory and no area limitation was required. *Others believed, however, that the stablization area should be defined and limited by law.*" *U. S. Code Cong. and Adm. News,* 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis supplied.)

The "others" were those who supported the Vinson Amendment which become a part of the bill.

From all of this it is apparent that Congress intended that in exchange for the free hand it was giving TVA in financing further development, it required that such development was to be kept within "the area for which [it] * * * or its distributors were the primary source of power supply on July 1, 1957." The language of Congress was clear and the "area" to which TVA was to be confined was ascertainable from conditions which existed on the critical date of July 1, 1957.

But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts "for the sale or delivery of power."

The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's

resolution amounts to a finding of fact, we consider that it was clearly erroneous. Fed. R. Civ. P. 52(a).

TVA argues that because several maps purporting to disclose the area of its service, which it furnished to the Congressional Committees considering the legislation, showed all of Claiborne County as within said area and did not disclose KU's corridor into Tennessee, it should be assumed that Congress by its Act made all of the County a part of "the area" of TVA. On trial, however, TVA's witnesses conceded that these maps were intended to be only "rough approximations" of its total area. The evidence disclosed that they failed to portray the numerous places where peninsulas or corridors contiguous to and parts of non-TVA areas intruded across the perimeter of and into the area portrayed as being exclusively that of TVA.

(b) Other evidence indicating the area of TVA-supplied power.

We have detailed above undisputed evidence that KU's corridor which included the Tazewells was contiguous to an area of Kentucky in which KU was not only the primary but the exclusive source of power supply. This was also confirmed by maps annually prepared by TVA to portray its "Transmission System." These maps covered years prior and subsequent to 1957, and subsequent to the effective date of the 1959 Act. In each of these maps, the KU corridor was shown as a continuation of KU's area in Kentucky and not as part of TVA's area. The corridor's boundaries and outline were not precisely delineated and New Tazewell was not shown as within the intruding corridor, but it is not claimed that New Tazewell was in fact outside the corridor. There was also in evidence a detailed map prepared in 1960 by the joint work of engineers for KU and PVA (the "Rowe-Osborne" map) which precisely delineated the line which separated the respective areas of these utilities. The Tazewells were within KU's area which ex-

tended north to the Tennessee-Kentucky line and the Tennessee-Virginia line. On the Tennessee side of the Kentucky-Tennessee line are Cumberland Gap and other municipalities in which KU was the exclusive source of power. The TVA Board resolution, however, determined that the "periphery" of TVA's area was along the northerly line of Claiborne County which is the Kentucky-Tennessee state line—this notwithstanding that the area in which KU was either the exclusive or primary source of electric power lay on both sides of the "periphery" adopted by its Board. Thus the Board "lopped off" from KU's area its corridor extending into Claiborne County and resolved that all of Claiborne County, including the Tazewells, was part of "the area" in which TVA was the primary source of electric power.

Among the map exhibits was one prepared by TVA in 1952 and delivered to KU's power engineers with a letter from one DeMerit, TVA's Chief Power Engineer. The letter described the map as "showing the areas now served by the LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the *Cumberland Gap-Tazewell Section of Tennessee.*" (Emphasis supplied.) The map, Exhibit 36, shows the KU corridor extending without break and with substantial width from KU's area in Kentucky and Virginia southerly to and including the Tazewells.[6a]

It appears to us that except for the maps presented to the Congressional Committees as "rough approximations," the maps prepared by TVA engineers, or in the making of which they collaborated, and the physical facts could be

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[6a] This is the same Exhibit 36 which is attached to the dissent. The dissent asserts that it portrays "KU's view of the same problem * * *." This is true, but as pointed out in the above text, this map was the production, not of KU engineers, but was made by *TVA* engineers to show *their* view of the areas served by the respective utilities.

consistent only with a finding that the Tazewells on July 1, 1957, were outside of an area in which TVA was the primary source of power. We are persuaded also that TVA's "rough approximation" maps were not intended to deal specifically with KU's relatively small peninsula extending as a part of its total area into Tennessee. Until about 1960 when the activity to have TVA take over the supply of power to the Tazewells commenced, all of TVA's own activities were consistent only with the conclusion we have reached. Its Board's resolution, adopted to sustain its position in this lawsuit, could not change the facts.

We should make clear that we are not deciding whether the involved 1959 Act would forbid TVA from entering into or expanding its service within areas served by private utilities where such areas are but islands within a larger area in which TVA is primary. Tazewell and New Tazewell are not such islands, but are attached to the "mainland" of KU's area of primary service. The fact that a line or lines of PVA may at one or more points enter into this corridor or, as the evidence shows, at one point cross one of KU's transmission lines, does not make islands of Tazewell and New Tazewell. We do not consider that the District Judge's recitation that:

> "KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell."

was a finding of fact that the Tazewells were "islands."

There was evidence that it would be economically advantageous to consumers in the Tazewells to receive their

power from TVA, either directly from PVA or through municipally owned systems. Whether TVA is in good faith seeking to help the citizens of Tazewell and New Tazewell obtain the benefits which flow from TVA is an irrelevant question here. We hold that the 1959 Act now forbids the involved expansion of TVA.

(c) Reviewability of TVA Board's determination.

Appellees assert that the District Judge made his own finding of fact on the critical issue, independently of the TVA Board's finding, and that under 52(a) Fed. R. Civ. P., such finding binds us, absent a valid conclusion by us that his finding of fact was clearly erroneous. We read the District Court opinion, however, as accepting the TVA Board's resolution as dispositive of the case, but if his decision in total amounts to a finding of fact, we consider it erroneous within the meaning of the mentioned rule.

As an alternative position, TVA contends that the 1964 resolution of its Board of Directors, made for the purpose of and on the eve of trial, was beyond judicial review. It is clear that such resolution was the product of advice provided by memoranda presented by TVA's Manager of Power, Mr. Wessenauer, and its General Counsel. The "rough approximation" maps which Wessenauer had presented to the Congressional Committees accompanied his memorandum. He advised the Board:

> "The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the

entire area served by TVA power would justify the time and expense involved in making the necessary studies."

With reference to his Congressional Committee maps, he said:

"The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA."

The General Counsel's memorandum included the following:

"The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA Act is a responsibility which Congress has placed on the TVA Board.

* * * * * * * *

"The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

"A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a

matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957,[7] and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell Counties."

Appellees support their argument on this point by citing cases which hold that where Congress has committed to a government agency the responsibility for making determinations preliminary to executive or administrative action, such determinations are beyond judicial review. We, however, do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957." Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board. If, in fact, the Tazewells were outside the area where TVA was primary, a contrary resolution by the TVA Board could not change the fact.

Leading cases supporting the doctrine invoked by appellees are *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309 (1958); *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. Ed. 559 (1840); *United States* v. *Black*, 32 L. Ed. 354 (1888); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108

[7] H. R. 3460, as originally presented, indicated an intention to use *counties* as the area within which to determine the controlling service area. But such language was eliminated in the final draft.

(1940). We will not attempt review of these and other cases cited, other than to observe that they involved the responsibility and right of executive and administrative agencies to make determinations essential to the exercise of granted power. The portion of the 1959 statute before us gave TVA authority to finance its development by issuance of bonds, but imposed specific restraints upon the future activities of TVA. We consider that the language of restraint was clear and did not need interpretation, discretionary or otherwise. Enforcement of the restraint is a judicial function. *Stark* v. *Wickard,* 321 U. S. 288, 309-310 (1944); *Peters* v. *Hobby,* 349 U. S. 331, 345 (1955); *Leedam* v. *Kyne,* 358 U. S. 184, 188 (1958). The District Judge did hold that the finding of the TVA Board was subject to his review and notwithstanding his reliance on the Board's resolution said:

> "It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U. S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra,* [252 F(2) 537, (CA 6, 1959) *cert. den.* 358 U. S. 830] *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U. S. 316."

We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this appeal.

2. *KU's standing to sue.*

KU does not have an exclusive franchise and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area. We are satisfied

that the Act's restrictions on TVA expansion were incorporated to protect KU and other established utilities from the destructive consequences of intrusion of TVA power into areas where such utilities had already been established as the primary source of power and which areas were "outside" of TVA's primary area.

The Senate Committee's report reviewing the plan and purpose of H.R. 3460, the bill enacted, recited that among other objectives of its Territorial Limitation was a purpose to "protect the areas now being served by private utilities." *U. S. Code Congressional and Administrative News*, 86th Congress, 1st Session, p. 2008 (1959). Remarks made by members of Congress make clear that concern for the rights of KU and other utilities in like situations prompted the limitations placed on TVA. Such being so, we believe that the courts are open to KU to seek protection of the rights which Congress created for it.

Of the cases relied on by appellees on the question of plaintiff's standing to sue, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 82 L. Ed. 374 (1938); *Tennessee Electric Power Company* v. *TVA*, 306 U. S. 118, 83 L. Ed. 543 (1939); and *Kansas City Power & Light Company* v. *McKay*, 225 F(2) 924 (CA D.C. 1955) *cert. den.*, 350 U. S. 884, speak most directly to the subject. All of them involve efforts by private utilities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue and the asserted ground for relief in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means whereby competitors of private utilities had or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted

on a federal statute enacted specifically for the protection of the involved plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds. Without attempting detailed analysis of the facts of each of these cases and the court's reasoning, we recite language from *Tennessee Electric* which we believe most nearly expresses the theory underlying all three of the cases. Speaking of the plaintiff's assertions, Justice Roberts said:

> "This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution."

and Justice Roberts then concludes that "[t]he contention is foreclosed by prior decisions that the damage consequent on competition, *otherwise lawful,* is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." 306 U. S. 139, 140, 83 L. Ed. 550, 551. (Emphasis supplied.)

Relying upon these principles, TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and, therefore, it is no business of KU where these municipal systems obtain their power.

But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit.

No precedent answers this question precisely, but we believe that there is ample authority for our affirmance of the District Judge's view that plaintiff had standing to sue. In *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F(2) 537, 544 (CA 6, 1958), where the plaintiff bank charged violation of federal and state statutes by the Comptroller of the Currency's grant of authority to open a branch bank, we said:

> "As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes * * *. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In *Stark* v. *Wickard,* 321 U. S. 288, 88 L. Ed. 733 (1944) standing to sue the Secretary of Agriculture by a milk producer who asserted that the Secretary's action offended a statute creating rights in plaintiff was sustained by the Supreme Court which said:

> "Here, there is no forum, other than the ordinary courts, to hear this complaint. When * * * definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved

> person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * * The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States* v. *Morgan*, 307 U. S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S. Ct. 795." 321 U. S. at 309-310, 88 L. Ed. at 747-748.

In *Leedom* v. *Kyne*, 358 U. S. 184 (1958) dealing with and sustaining a District Court's jurisdiction to hear a complaint which charged the NLRB with illegal conduct, the Supreme Court said:

> "This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U. S. 188.

See also, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964); *Texas & P. R. Co.* v. *Rigsby*, 241 U. S. 33, 39-40, 60 L. Ed. 874, 877 (1916). It would be useless for Congress to include distinct limitations upon the expansion plans of such public corporations as TVA if there was no way to force them to keep within such limitations.

We hold that KU had standing to sue and on the merits should have been accorded appropriate relief. This disposition makes it unnecessary that we consider other contentions made by KU in support of its claim for relief.

Judgment of dismissal is reversed and the cause is remanded for further proceedings consistent herewith.

EDWARDS, Circuit Judge, dissenting. The majority opinion would in my view construe statutory restrictions in the 1959 Tennessee Valley Authority Act, 73 Stat. 280 (1959), 16 U.S.C. § 831n-4 (1964), much more narrowly than it appears to me Congress intended. The Tennessee Valley Authority sought authority from Congress to issue revenue bonds to expand its facilities for furnishing electric power within the general area served by TVA. The bill proposed by TVA was opposed vigorously by privately owned power companies whose service areas impinged upon TVA's. As a result of this opposition, when the 1959 TVA Act was passed, it contained language generally restricting the areas which TVA could supply to those which it was serving as the primary source of power on July 1, 1957, and to an area no more than five miles outside the perimeter of such area.

The limiting provision follows:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside *the area* for which the Corporation or its distributors were the *primary source of power supply on July 1, 1957*, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And

provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act. . . ." (Emphasis supplied.) 73 Stat. 280 (1959), 16 U.S.C. 831n-4(a) (1964).

This action is a suit for an injunction by Kentucky Utilities Company against TVA seeking to restrain it from providing electric power to two municipal electric distribution systems in the towns of Tazewell and New Tazewell, Tennessee. The two major parties agree only on the fact that legal construction is needed for the words "area" and "primary source of power" in the first clause of the portion of 16 U.S.C. § 831n-4, the 1959 TVA Act which we have quoted.

Briefly put, it is the contention of KU that its area of service reaches down from Kentucky into Claiborne County, Tennessee, in a narrow peninsula of service along its transmission line, and that it represented the primary source of power supply on July 1, 1957, for the towns of Tazewell and New Tazewell, Tennessee.

Briefly put also, TVA's position is that TVA's power lines, through its subsidiary, Powell Valley Electric Cooperative, criss-crossed all of Claiborne County on the crucial date of July 1, 1957, and served a portion of the

Tazewells and plainly, in TVA's contention, represented the primary source of power for Claiborne County.

TVA also points out factually that its transmission line of Powell Valley cut across KU's transmission line rendering KU's Tazewell facilities an island.

TVA's view of the "area" concerned in this matter is portrayed by its Exhibit 91. (Attached hereto following page 27.)

KU's view of the same problem is dramatically different, as shown in Exhibit 36. (Attached hereto following page 27.)

Although it seems unlikely, both exhibits refer to this same dispute and to the same general geographical locality.

It is clear, as the District Judge who heard this case found, that TVA was the dominant supplier of electric power in Claiborne County while KU was the dominant supplier of electric power within the city limits of Tazewell and New Tazewell.[1]

---

[1] "As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

"On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service." (Quoted from Trial Judge's Memorandum Opinion, Appellant's Appendix at pp. 49a-50a.)

It is also clear that neither of these utilities had any exclusive franchise to serve any territory here in dispute. It is also clear that KU had many customers in Claiborne County, while TVA had customers in both Tazewell and New Tazewell on the critical date.

After an interesting review of the Congressional history of the 1959 TVA Act, Judge Taylor concluded:

> "The TVA Board of Directors on August 26, 1964 made an official and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.
>
> "The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is indentical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.
>
> "The finding of the Board was made in good faith and supported by substantial evidence.
>
> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson,* 127 F. Supp. 400.
>
> "None of the defendants has induced or conspired to induce any electric customer of KU to breach his or

its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

"It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint."

The maps to which Judge Taylor refers are before this court. They were before Congress when it passed the disputed legislation. Tazewell and New Tazewell are clearly within both the Tennessee watershed and the perimeter of the TVA service area as it was outlined to Congress. In these cities on July 1, 1957, no private utility had any exclusive franchise, and in fact, TVA was then furnishing power to customers. In addition, the cities are located in a county where TVA clearly was the primary source of power on July 1, 1957. Under this set of facts, I do not see how we can properly interpret the 1959 TVA Act as making illegal a finding of fact by the Board of TVA that it was "the primary source of power" for "the area" concerned on July 1, 1957. The 1959 TVA Act and its relevant amendment seem to me to support TVA authority to make this finding. (73 Stat. 280 (1959), 16 U. S. C. 831 (1964). See in particular 16 U. S. C. 831i and 16 U. S. C. 831h-4). Judge Taylor so interpreted the Act and found "substantial evidence" to support the crucial finding.

I believe that Judge Taylor's interpretation and application of the statutory language represents both logical construction of the statutory language and compliance with Congressional intent.

I concur with my brothers' view that the 1959 TVA Act should be construed as giving KU standing to bring this suit, but I would affirm the District Judge's order dismissing same for the reasons given above and in his complete opinion.

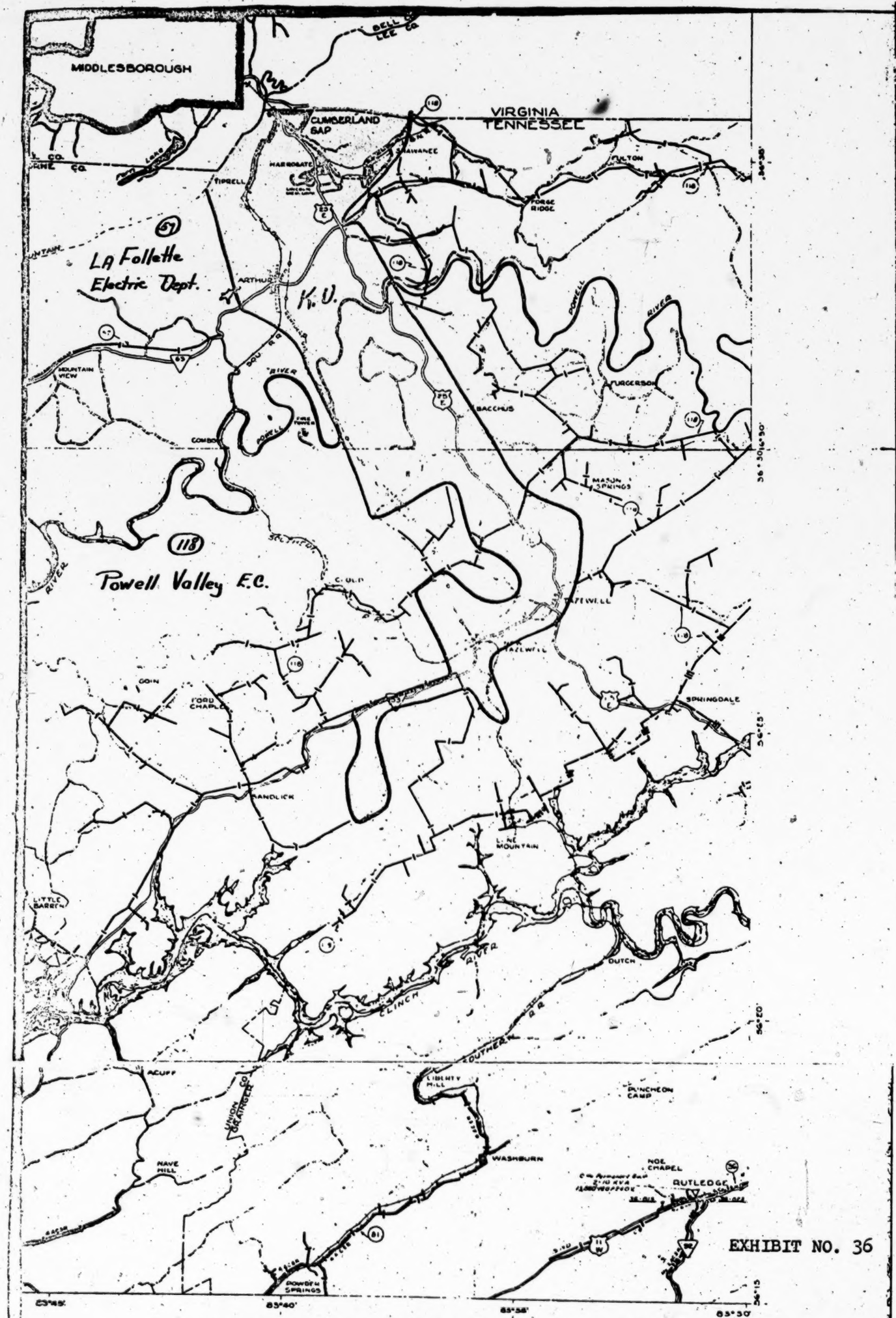


EXHIBIT NO. 36

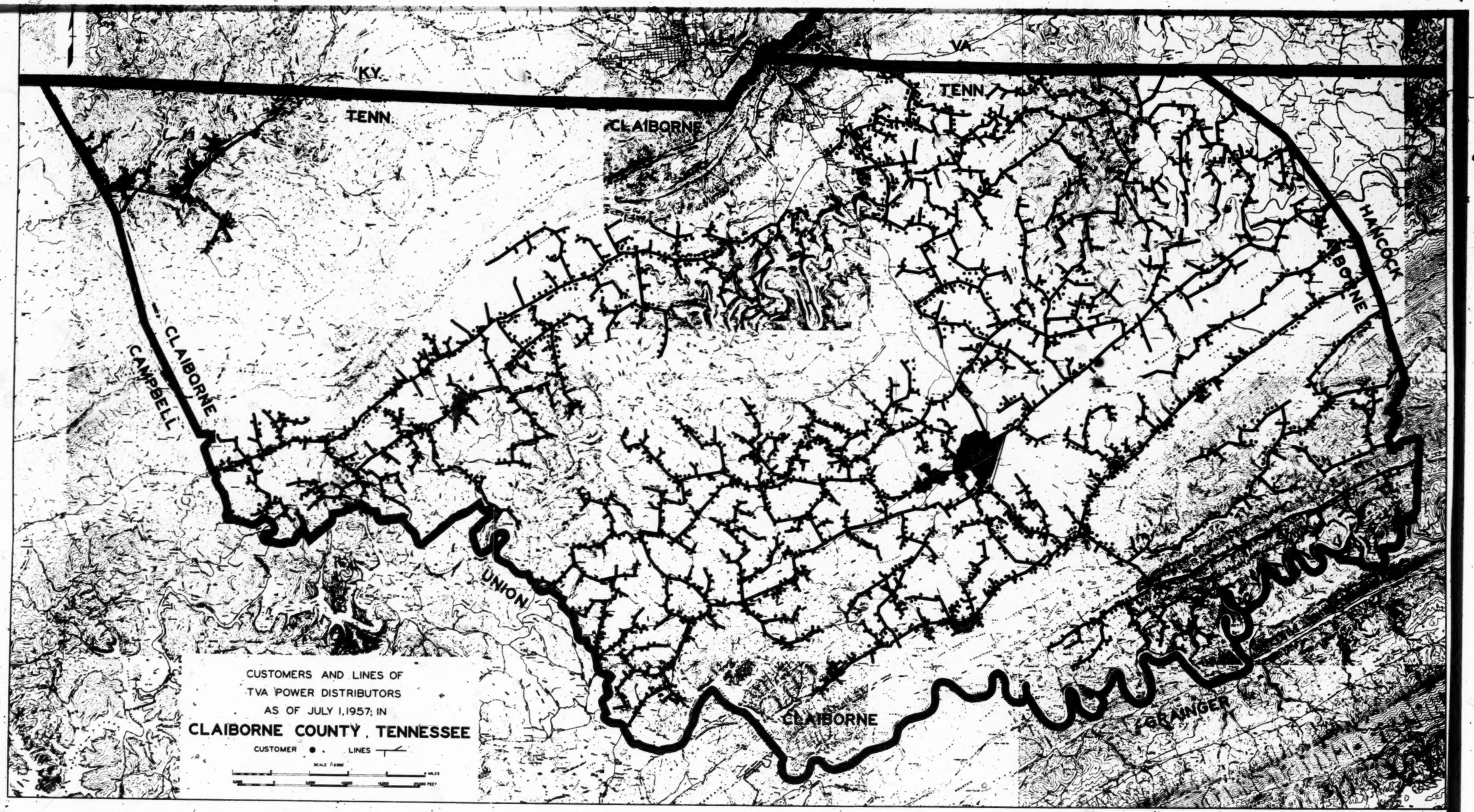
COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA

(36) APPALACHIAN ELECTRIC COOPERATIVE
(81) KNOXVILLE ELECTRIC POWER AND WATER BOARD
(57) LA FOLLETTE ELECTRIC DEPT.
(118) POWELL VALLEY ELECTRIC COOPERATIVE

TENNESSEE VALLEY AUTHORITY
DEPARTMENT OF OPERATIONS
TRANSMISSION AND RURAL DISTRIBUTION LINES IN CAMPBELL, CLAIBORNE, UNION AND GRAINGER COUNTIES, TENNESSEE

DATE: 9-13-46
E.A.R.
E.A.S.
W.L.F.

36-3
L-C-30



Map of Claiborne County, Tennessee, showing customers and lines of distributors of TVA power as of July 1, 1957

Exhibit No. 9

APPENDIX C

PERTINENT SUB-SECTION OF TVA 1959 FINANCING ACT.

(As Amended by PL 89-537—1966)
16 U.S.C. § 831n-4

Bonds For Financing Power Program—Authorization; Amount; Use of Proceeds; Restriction on Contracts For Sale or Delivery of Power; Exchange Power Arrangements; Payment of Principal and Interest; Bond Contracts.

(a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $1,750,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area ex-

tending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area; Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale

and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any

indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1056 50

POWELL VALLEY ELECTRIC COOPERATIVE,
Petitioner,

vs.

KENTUCKY UTILITIES COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLYDE Y. CRIDLIN,
Jonesville, Virginia 24263,

Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No .....

POWELL VALLEY ELECTRIC COOPERATIVE,
Petitioner,

v.

KENTUCKY UTILITIES COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The opinion of the District Court is reported in 237 F. Supp. 502 and printed in Appendix A to the petition for certiorari heretofore filed by Edward J. Hardin and

James B. DeBusk. The opinion of the Court of Appeals and the dissenting opinion, which are unreported, are printed in Appendix B to such petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does section 15d(a) of the Tennessee Valley Authority Act (16 U.S.C. §831n-4(a)) insulate a private utility from the competition of two small municipalities using TVA power supplied to them by a rural electric cooperative which on July 1, 1957, had lines completely surrounding the towns and supplied TVA power on all sides of the towns and within the towns themselves?

2. Where the TVA Board of Directors has construed section 15d(a) of the TVA Act as not prohibiting the sale of TVA generated power in competition with private utilities within such towns, does such construction represent a reasonable exercise of the Board's executive responsibilities which is not subject to judicial reversal?

3. Where the TVA Board has determined that two small towns are inside the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and such determination was made in good faith and supported by substantial evidence, may such determination be overturned by the courts?

STATUTE INVOLVED

The principal statutory provision involved is section 15d(a) of the TVA Act, which is printed as Appendix C to the petition of Messrs. Hardin and DeBusk.

STATEMENT OF THE CASE AND REASONS FOR GRANTING WRIT

Petitioner adopts the STATEMENT OF THE CASE and REASONS FOR GRANTING THE WRIT as set forth in the petitions of Messrs. Hardin and DeBusk and of the Tennessee Valley Authority.

Respectfully submitted,

CLYDE Y. CRIDLIN
Jonesville, Virginia

Attorney for Petitioner

CERTIFICATION

I hereby certify that on this 11th day of February, 1967, I served the foregoing Petition for Writ of Certiorari upon the parties by mailing a copy of the same to:

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Ogden, Robertson & Marshall
Marion E. Taylor Building
Louisville, Kentucky 40202

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(s) Clyde Y. Cridlin
Jonesville, Virginia

Attorney for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

KENTUCKY UTILITIES COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Tennessee Valley Authority, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 15, 1966.

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (App. A, *infra*, pp. 12–44) are not yet reported. The opinion of the district court (App. C, *infra*, pp. 46–70) is reported at 237 F. Supp. 502.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 45) was entered on November 15, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Tennessee Valley Authority Act prohibits TVA from entering into contracts that would make it or its distributors a source of power supply outside of "the area" for which TVA or TVA distributors were "the primary source of power supply" on July 1, 1957. The TVA Board of Directors determined that two small Tennessee municipalities were within the primary area in circumstances where it appeared (1) that a private utility was the principal supplier of power in the towns themselves but (2) that TVA distributors were supplying the bulk of power in the county involved, including an area entirely surrounding the two towns. The questions presented on the merits[1] are:

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[1] If certiorari is granted, we shall also discuss the threshold jurisdictional question of the standing of a private utility to enforce the territorial limitation in the TVA Act. The question has not been settled in the precise context that is here presented. In other contexts, the courts of appeals have generally concluded that mere economic competition made possible by governmental action is *damnum absque injuria*. Thus, for example, it has uniformly been held that a private utility does not have standing to challenge a loan by the Rural Electrification Administration to an electric cooperative that is in competition with the utility. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Iowa-Illinois Gas & Elec. Co.* v. *Benson*, 247 F. 2d 22 (C.A.D.C.), certiorari denied, 356 U.S. 949; *Rural Electrification Administration* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. Compare *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118. See, also, *Pennsylvania Railroad Company* v. *Dillon*, 335 F. 2d 292 (C.A.D.C.), certiorari denied, *sub nom. American-Hawaiian Steamship Co.* v. *Dillon*, 379 U.S. 945; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (C.A. 2). While

1. Whether the court of appeals erred in ruling that the Board's determination is entitled to no deference and that the courts are to determine (or delineate) *de novo* the primary area of TVA's service.

2. Assuming that the case is governed by normal principles of judicial review of executive action, whether the Board properly exercised its authority in interpreting and applying the statute to the case at bar.

STATUTE INVOLVED

The pertinent provisions of the Tennessee Valley Authority Act are printed in App. D, *infra*, pp. 71–78.

STATEMENT

Section 15d of the Tennessee Valley Authority Act, added by amendment in 1959, authorized TVA to issue revenue bonds to finance additions to its power system, but, at the same time, imposed certain territorial limitations on the sale of TVA power. With exceptions not applicable here, TVA may not enter into contracts that would make it or any of its distributors a source of power supply outside "the area for which the Corporation or its distributors were

---

the standing of State banks to challenge attempts by competing national banks to open additional offices has been sustained (*e.g.*, *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F. 2d 290 (C.A.D.C.), reversed on other grounds, 379 U.S. 411; *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830), both the District of Columbia and Fifth Circuits have concluded that such cases are factually distinguishable from those involving utilities. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F. 2d at 298; *Rural Electrification Administration* v. *Central Louisiana Elec. Co.*, 354 F. 2d at 864.

the primary source of power supply on July 1, 1957" and an "additional area extending not more than five miles around the periphery of such area." There are limitations on the supplying of power in the five-mile peripheral area, including a prohibition against supplying power to a municipality in the area that was receiving power from another source on or after July 1, 1957, but there are no limitations upon the supplying of TVA power in the primary area.

Respondent, Kentucky Utilities Company, brought this suit to enjoin the supplying of TVA power to electric consumers not already receiving such power within the municipal limits of Tazewell and New Tazewell, two small towns located in Claiborne County, Tennessee. The ground of the suit was that these towns are outside the TVA primary area. The suit was brought against TVA, the mayors of the two towns,[2] and Powell Valley Electric Cooperative, a distributor of TVA power. The pertinent facts may be summarized as follows:

On July 1, 1957, Powell and another TVA power distributor supplied about two-thirds of the electric service in Claiborne County. Their distribution lines covered most of the county and completely surrounded the Tazewells. However, in Tazewell and New Tazewell, although Powell served a number of customers in each town, most of the service was supplied by respondent. Its rates were much higher than Powell's for any substantial load. For example, the electric

[2] The mayors have already filed a petition for a writ of certiorari, No. 962, this Term.

bill for a modern electrically heated house under respondent's rates was almost 2½ times as high as under Powell rates. As a result, property in the Tazewells having Powell service sold at substantially higher prices than property served by respondent, and the high cost of respondent's power discouraged industry from moving into the towns. The townspeople decided to seek TVA power.

On February 4, 1960, representatives of the two towns and of Middlesboro, Kentucky, met with the TVA Board of Directors. The Board informed them that Tazewell and New Tazewell were within the primary area and therefore could properly be supplied with TVA power, but that Middlesboro, located about a mile north of Claiborne County, was outside the primary area and could not be so supplied. The Board suggested that, because of their small size, the Tazewells explore the possibility of obtaining TVA power through Powell. The towns decided to establish a municipal system and made arrangements with Powell to provide the power supply and operate the system for them.[3]

The district court held that respondent had standing to sue and that the determination of the TVA Board that the Tazewells were within the primary TVA area had been made in good faith and was supported by substantial evidence. After reviewing the facts and

[3] Subsequently, on August 26, 1964, the TVA Board, in response to inquiries from various sources as to the availability of TVA power in other parts of Claiborne County, made a formal determination that all of Claiborne County (including the Tazewells) is within TVA's primary area.

the legislative history at length, the court concluded (App. C, *infra*, p. 70):

> * * * We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. * * *

The court of appeals reversed, holding that plaintiff had standing to sue, and, with Judge Edwards dissenting, that the determination of the TVA Board as to the scope of the primary area had no legal effect and that the court should make its own independent determination. The court said (App. A, *infra*, pp. 31, 32):

> * * * We, however, do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957." Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board. * * *
>
> * * * We consider that the language of restraint was clear and did not need interpretation, discretionary or otherwise. * * *

The court apparently construed the TVA Act as requiring that any area served by a private utility be excluded from the TVA primary area if connected by as much as a single power line to the utility's major service area (App. A, *infra*, p. 28).

REASONS FOR GRANTING THE WRIT

An important amendment to the Tennessee Valley Authority Act, added in 1959, authorized TVA for

the first time to raise money for expansion and development through the sale of bonds. At the same time Congress provided that, with certain exceptions not applicable here, TVA should make no contracts which would make it or its distributors a source of power supply beyond "the area" for which they were the "primary source of power supply" on July 1, 1957. This is the first case to come before this Court involving the delineation of that area.

The Act sets forth no standards—contains no criteria—defining the area for which TVA is the primary power source. Nor does the legislative history supply a basis for inferring precise standards. On the contrary, it emphasizes "elasticity and adjustment" (S. Rep. No. 470, 86th Cong., 1st Sess., pp. 8–9). The result has been considerable confusion—and the prospect is one of mounting litigation. We are advised by TVA officials that areas of potential conflict exist along perhaps half of the vast periphery of the multi-State region served by TVA and its distributors. Several suits involving the interpretation of the territorial-limitation provision are pending in the lower federal courts;[4] others are anticipated. TVA, its distributors and the thousands of businesses and individuals whose power needs are involved have a

[4] *Kentucky Utilities Co.* v. *Tennessee Valley Authority*, Civil No. 1158, W.D. Ky.; *Jackson Purchase Rural Elec. Coop. Corp.* v. *Tennessee Valley Authority*, Civil No. 1275, W.D. Ky.; *Kentucky Utilities Co.* v. *Udall*, Civil No. 4835, W.D. Ky.; *Georgia Power Co.* v. *Tennessee Valley Authority*, Civil No. 1788, N.D. Ga.

strong interest in prompt clarification of the meaning and application of the provision.

We suggest that there is only one sound and workable solution to the problem—given the complete absence of legislative standards—and that is to recognize a broad discretion in the TVA Board of Directors to interpret and apply the Act in conformity with the goals and practical realities of the TVA program. This is also the evident design of the statute. The 1959 amendment necessarily imposed on the TVA Board a duty to determine the area in which TVA or its distributors were the primary source of power supply on July 1, 1957. The TVA Act affirmatively requires that TVA power be made available to public bodies and cooperatives within the permissible area (§§ 10, 12). Given a request for a power contract by such a customer, the TVA Board must determine whether the execution of such a contract will make TVA a source of power supply outside the permissible area, which in turn necessitates a delineation of the primary area and the periphery thereof; otherwise the Board could neither grant nor reject the request. Congress having directed the Board to determine the scope of the primary TVA area, and having supplied no standards to guide such determination, the inference is inescapable, we submit, that Congress intended to vest broad discretion in the Board. We stress that there are no simple methods for determining the TVA periphery[5] and that the task re-

[5] The court below plainly erred in suggesting that the Act lays down a single rigid standard. The "service area" concept adopted by the court, whereby there can be no competition be-

quires the experience and knowledge of local conditions and needs that only TVA possesses.

The court below explicitly rejected this approach, ruling that the Board's determination was entitled to no weight. This issue thus emerges well defined—particularly so since the Board's decision that the towns in question are within the area for which TVA is the primary power source, is, in the circumstances, manifestly reasonable and in accordance with the facts.

The towns were enclaves of private power, wholly surrounded by the lines of TVA distributors in rural areas served predominantly by those distributors, and linked to respondent's other service areas only by the transmission lines themselves.[6] Moreover, in concentrating upon the towns and declining to serve most of the surrounding rural areas, respondent was apparently

---

tween two or more utilities in any given area, so that any area served by a private utility is automatically excluded from the TVA primary area, was rejected by Congress. The statutory test is whether TVA is the primary source of power for an area—not whether another utility provides service there as well.

[6] Within the five-mile peripheral area surrounding TVA's primary area, TVA is forbidden to supply power to any municipality receiving power from a private utility (Statement, *supra*, p. 4). There is no such limitation on service within the primary area itself. This indicates that TVA is not barred from serving enclaves of private power in that area. In addition, the legislative history indicates that "small areas served by private power entirely surrounded by the lines of TVA distributors" were within the TVA primary area. S. Rep. No. 470, 86th Cong., 1st Sess., p. 9.

following a deliberate policy of skimming off the most lucrative power business in the area and leaving the less profitable rural business to TVA distributors—a practice Congress surely had no intention of encouraging. Finally, maps that were before Congress in its deliberation on the 1959 amendment clearly showed the Tazewells as part of the area for which TVA was the principal power source (see App. A, *infra*, pp. 43–44).

If the court below were, as it believed, free to make an independent judgment on the application of the territorial limitation in the Act to the facts of this case, it could perhaps be argued—though not, in our view, persuasively—that it was entitled to reject the foregoing factors. But we do not think this judgment was one properly for the court in the first instance. *Decatur* v. *Paulding*, 14 Pet. 497; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Wright*, 11 Wall. 648; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309; cf. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546. Uniform and sound delineation of the TVA area clearly requires that the courts defer broadly to the Board's expertise. That is the basic issue here. We believe it plainly merits plenary consideration, since it will doubtless prove decisive in the continuing application of the statutory provision to the innumerable variant situations which the Board encounters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
CHARLES J. McCARTHY,
General Counsel,
Tennessee Valley Authority.

FEBRUARY 1967.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 16491

KENTUCKY UTILITIES COMPANY, PLAINTIFF-APPELLANT

v.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, INDIVIDUAL, AND AS MAYOR OF TAZEWELL, TENNESSEE, AND JAMES B. DEBUSK, INDIVIDUAL, AND AS MAYOR OF NEW TAZEWELL, TENNESSEE, DEFENDANTS-APPELLEES

Appeal From the U.S. District Court for the Eastern District of Tennessee

Decided November 15, 1966.

Before O'SULLIVAN and EDWARDS, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

O'SULLIVAN, *Circuit Judge:* This is an appeal from a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, dismissing a complaint for injunctive relief. Plaintiff-appellant, Kentucky Utilities Company, a Kentucky Corporation (hereafter KU) had sought to have Tennessee Valley Authority (hereafter TVA), Powell Valley Electric Cooperative, a TVA distributor (hereafter PVA), and the respective mayors of the cities of Tazewell and New Tazewell, Tennessee, restrained from taking over KU's electric customers in the area of Tazewell and New Tazewell, and gener-

ally to restrain TVA and PVA from taking over the supply of electric power to those Tennessee cities.

KU's asserted ground for relief was its claim that it was and had been, before and after July 1, 1957, the primary source of electric power to the consumers in the Tazewells; that in 1963 and prior thereto the municipal authorities of the Tazewells made plans and "conspired" with TVA and PVA to introduce additional TVA power into the area and had commenced to take over KU's customers; and that all of such plans and conduct were and would be violative of an amendment added in 1959 to the Tennessee Valley Authority Act as Section 15d thereof, (Public Law 86–137; 72 Stat. 280), which is subsection (a) provides that,

> Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* * * *. [Emphasis supplied.] Title 16 U.S.C.A. § 831n–4(a).[1]

[1] The 1959 Act authorized TVA to issue and sell bonds in an amount not exceeding $750,000,000 outstanding at any one time, "to assist in financing its power program," but burdened such authority with defined restrictions. We consider that only that portion of the restrictions quoted above is relevant here, but both litigants claim support for their respective positions in the various provisos that follow the quote. We set out the entire restrictions as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or

On the critical date, July 1, 1957, KU and PVA were both supplying power in the involved municipalities, but KU supplied 561 customers out of a total of 589, or 95.3% thereof, PVA serving the remaining 28 customers. In the month of June, 1957, KU supplied 228,087 KWH of electricity out of a total 242,853, or 93.9% thereof, PVA supplying the balance of 14,-

its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however*, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; *And provided further*, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof."

766 KWH. As found by the District Judge, "On August 6, 1959, the day the Act in question became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell, KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31." It was the contention of KU that the foregoing and other evidence established that the cities of Tazewell and New Tazewell were "outside the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957," and that TVA and PVA were forbidden additional entry into the area. In defense, TVA and PVA asserted that the basic "area" should not be limited to that part of Tennessee in which KU was the primary source of power, but should encompass that larger portion of Tennessee, including all of Claiborne County, in which TVA and its distributors were in total the primary source of power. In Claiborne County, in which the Tazewells were located, two TVA distributors, PVA and the City of LaFollette Electric System, were suppliers. KU also supplied power outside of the Tazewells along a corridor extending into Tennessee from the area of Kentucky wherein KU was also the primary, if not the exclusive, source of power. While PVA and LaFollette Electric System together may have exceeded KU in customers and power delivered, KU was the largest single source of power supply in the whole of Claiborne County. The District Judge found that in Claiborne County:

> As of July 1, 1957 Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of

1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,-999.17 as against KU investment on June 30, 1957 of $457,947.93. 237 F. Supp. at 513.

There was evidence that KU was also the primary source of power in the area of its corridor outside of the Tazewells and that its corridor had a total area of about 60 square miles.

The meritorious issue before the District Judge was whether, as contended by KU, and within the meaning of the 1959 Act, the cities of Tazewell and New Tazewell were outside the area wherein TVA or its distributors were the primary source of power on July 1, 1957.[2] In addition to their defense on the merits, defendants-appellees pleaded that plaintiff lacked standing to maintain the action. The District Judge concluded that plaintiff had standing to sue but held for defendants on the merits. *Kentucky Utilities* v. *Tennessee Valley Authority,* 237 F. Supp. 502 (E.D. Tenn. N.D. 1964).

Defendants-appellees reassert here their defense that plaintiff was without standing to sue, and ask that the judgment of dismissal be affirmed on such ground, regardless of the merits. We defer threshold discussion of this question, believing that the reasons which prompt our disposition of it will be more clearly exposed by our consideration of the merits.

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[2] Plaintiff's complaint also charged all defendants with conspiracy to illegally deprive it of its property in the area in question. The District Judge dismissed this claim and it is not presented by the appeal before us.

We sustain the District Judge's denial of the standing to sue defense, but reverse the judgment which dismissed the cause on the merits.

There is little controversy over the essential and dispositive facts, although the litigant adversaries differ as to their significance. Plaintiff Kentucky Utilities Company is an investor-owned electric public utility, serving customers in about two-thirds of the State of Kentucky, in Claiborne County, Tennessee, and through a subsidiary, in four counties in southwest Virginia. Its transmission lines serving this entire area constitute an integrated and continuous system, and all parts of the area served are substantially contiguous. Its Claiborne County, Tennessee, area begins at an area served by it in the State of Kentucky, adjacent to that state's southerly line and then extends along and within a peninsula or corridor into Claiborne County, Tennessee, 15 or so miles to include the cities of Tazewell and New Tazewell. The record before us leaves us uncertain as to the exact width of this corridor and indeed at one point its width and contiguity with the adjoining area may be limited to the dimension of a transmission line at a point where a transmission line of PVA crosses it. This KU corridor is bounded on the east, south and west by TVA distributors and on the north by the main area served by KU itself.

KU's activity in the above area began as early as 1919 and from 1920 it has been serving customers in Tazewell and New Tazewell, which localities became incorporated as cities of Claiborne County in 1954. KU has a non-exclusive franchise to provide electricity to customers in all of Claiborne County. The fixed corporate limits of Tazewell and New Tazewell define the area in which KU on July 1, 1957, was the primary source of the electric power consumed

therein. Beginning in 1961 and 1962, citizens and officials of Tazewell and New Tazewell were attracted to the apparently lower rates of PVA,[3] which is a distributor of TVA power in adjacent areas and with the few customers in the Tazewells above referred to. After meetings between representatives of these cities and of Claiborne County with TVA and PVA officials, the two towns decided to set up municipal electric systems which would purchase power from PVA at wholesale rates and re-distribute it. The cities' offer to buy the facilities of KU was refused. Activity toward establishing a municipal system then began, but up to the start of this lawsuit this activity consisted of disconnecting KU's line to several of its consumers and reconnecting them to PVA.

This case was started on November 7, 1963, and any activity thereafter by PVA and TVA in the Tazewells has been suspended in obedience to an order of the District Court.

1. THE MERITS

The meritorious and controlling question is whether Tazewell and New Tazewell were "outside the area for which the Corporation [TVA] or its distributors were the primary source of power on July 1, 1957."[4]

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[3] KU contends that, properly analyzed, its rates are not less economical to their customers than PVA rates. Resolution of this question, however, is not necessary to our decision.

[4] We need not consider whether, consistent with the 1959 Act, the Tazewells were part of an "additional area extending not more than five miles around the periphery of such area as may be necessary to care *for the growth of the corporation and its distributors within said area.*" [Emphasis supplied.] Neither TVA nor PVA contends that taking over the power distribution in the Tazewells is necessary for the growth of TVA with-

The litigants' pleadings presented issues of fact and law to the District Judge, but as discussed hereinafter we do not consider that there was a real controversy over the basic facts. Decision of the case involves determination of the relevant "area" within which TVA or its distributors constituted "the primary source of power supply on July 1, 1957." If the relevant area does not include the towns of Tazewell and New Tazewell, then TVA and PVA were, by the 1959 Act, foreclosed from making further contracts for power supply therein. TVA's position that "it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957" is supportable only if it is permitted to dilute KU's clear primacy in the Tazewells by detaching them from KU's total and contiguous area of service and making them an integral part of territory in which TVA was dominant. On August 26, 1964, after the issues had been drawn and shortly before trial, the TVA Board of Directors adopted the following resolution:

> That the Board of Directors hereby finds and determines that all of Claiborne County Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

Numerous maps in evidence showed that KU's corridor into Tennessee was contiguous to its larger area of service in Kentucky and Virginia which admittedly was no part of TVA's service area. The TVA Board's resolution determined that the *periphery* of its area of primary power supply was along the easterly line of Virginia and the southerly line of Kentucky, thus

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in the area contiguous to the Tazewells if the Tazewells are actually outside of the area for which TVA or PVA were the primary source of supply on July 1, 1957.

cutting off KU's corridor of power supply in Tennessee from the balance of its area of service. The Board resolved:

> That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee [Campbell County abuts on Claiborne on the west] is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee.[5]

We consider that the District Judge's conclusion was bottomed primarily upon his acceptance of the TVA resolution as dispositive of the case. His opinion recites:

> The finding of the Board was made in good faith and supported by substantial evidence.
>
> The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U.S.* v. *Burleson*, 127 F. Supp. 400.

(*a*) *Legislative history*

Examination of the legislative history of the 1959 Act has helped our resolution of the question before

[5] KU contends that the periphery of the area in which TVA was the primary source of supply should follow the lines which mark the outer limits of such area and in this case it should have dipped down into Tennessee so as to exclude the corridor in which KU was the primary source of power supply.

us. In 1955, TVA was faced with the prospect of rapidly increasing demands for power for its existing customers. It sought a way to meet the cost of new facilities without dependence upon annual national budget considerations. It suggested that Congress give it the power to issue bonds to private and public investors to finance the development. In this effort Senate Bill 2373, 84th Congress, 1st Session (1956) was introduced. This bill contained no territorial limits to the expansion that TVA could accomplish with the proceeds of the bonds. Gabriel O. Wessenauer, Manager of Power for TVA, spoke for it before the Congressional Committees which considered legislation that was proposed. He made it clear that territorial expansion was not contemplated, but that TVA sought power and finances to insure sufficient capacity to accommodate the growth of the system load. *Cf. Hearings, Senate Committee of Public Works,* 84th Congress, 1st Session, S. 2373, pp. 65, 79 (1956). The Committee understood this to be TVA's limited objective. Senator Cotton remarked "Its [TVA's] purpose is to have growth rather than expansion in that you may have more electricity, more power to serve the territory that you presently serve." Id. at 114. At the time this legislation was under consideration, the area served by TVA and its distributors had more or less stabilized; this area comprised all of the State of Tennessee except the peninsula or corridor involved here and parts of Kentucky, Virginia, Georgia, Alabama and Mississippi bordering on Tennessee. The history of troubles and collisions between TVA and private power companies was of course known to Congress, but a degree of repose had existed for some time. Congress, as the source of money, had exercised power over TVA's geographic growth, but possession

by TVA of authority for self-financing might indeed call for substitute controls upon its expansion. S. 2373 was never passed, and two years later, in 1958, two new bills, H.R. 3236 and H.R. 4266, 85th Congress, 1st Session, were proposed. These bills also made no provision for any territorial limitations. This was a cause of concern to some members of Congress. A typical inquiry was, "Can the TVA Directors issue bonds to expand its area outside of the district now covered by TVA?" An answer was made, "* * * there has not been a single instance in the history of this Committee in which the Tennessee Valley Authority has gone in to 'raid' any utility's territory." *Hearings, House Committee on Public Works,* 85th Cong., 1st Sess., H.R. 3236 and H.R. 4266, p. 16 (1958). TVA's Wessenauer added "We have not run any parallel lines for 10 to 20 years. *Id.* at 94. A statement by a representative of the private power companies that the bill posed the "threat of geographic as well as capacity expansion" was dismissed by a supporter of the bill as the raising of an old "bogey." *Id.* at 156–159.

After the above bills failed of enactment, four new ones were introduced into the Senate: S. 1855 which proposed to limit TVA to its "service area" as of July 1, 1957; S. 1869 which merely required TVA to allow Congress 60 days to veto any proposed expansion before beginning it; S. 1986 which would have limited TVA to replacing existing facilities; and S. 2145 which would have required congressional approval for any expansion. Although none of these bills became law, it had become apparent that definition and imposition of some limitation on TVA growth was going to have to be a part of any successful bill.

In 1959, H.R. 3460, which ultimately became the 1959 TVA Act, was introduced. As offered, this bill

would have limited TVA to "counties lying in whole or in part within either the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957." During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accomodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *of Hearings, Senate Committee on Public Works,* 86th Cong., 1st Sess., S. 931 and H.R. 3460 pp. 39-51 (1959); between the Georgia Power Co. and TVA, *Id.* at 220, and indeed in our own case between KU and PVA.[6] Rep Vinson stated that his amendment "writes into the law the 'gentlemen's agreement.'" *Hearings,* 86th Cong., 1st Sess.,

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[6] In 1958 a written agreement was made between KU and TVA's distributor, PVA. Fairly read, this agreement provided that KU and PVA would mutually avoid "raiding" customers in their respective areas. To insure understanding and delineation of such areas, engineer representatives of KU and PVA collaborated in the preparation of a map which, upon its completion in 1960, showed the Tazewells as part of the territory in which KU was the primary source of power. After the activity to have additional TVA power brought into the Tazewells, PVA gave notice of termination of its 1958 agreement with KU. With reference to some new projects then contemplated for the Tazewells, a TVA District Manager, on October 18, 1962, recited in a memorandum to TVA's Director of Power Marketing that "Under the territorial agreement between the Cooperative [PVA] and KU, effective January 16, 1958, *both of these projects are in KU's territory.*" [Emphasis supplied.]

House Committee on Public Works, H.R. 3460, p. 111 (1959).

Three months later, H.R. 3460 was before the Senate Committee, together with S. 931, a bill which more or less conformed to the version of H.R. 3460 originally submitted to the House Committee. The threat of possible expansion of TVA under S. 931 excited numerous and vigorous protestations from representatives of power companies, whose statements consume some 70 pages of the report. *Senate Committee on Public Works,* 86th Cong., 1st Session, S. 931 and H.R. 3460, pp. 170–240 (1959). Ultimately, S. 931 was rejected, and H.R. 3460 was reported out and passed.

In the Senate Report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:

> Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stabilization area should be defined and limited by law. U.S. Code Cong. and Adm. News,* 86th Cong., 1st Sess. 1959, p. 2007. [Emphasis supplied.]

The "others" were those who supported the Vinson Amendment which become a part of the bill.

From all of this it is apparent that Congress intended that in exchange for the free hand it was giving TVA in financing further development, it required that such development was to be kept within "the area for which [it] * * * or its distributors were the primary source of power supply on July 1,

1957." The language of Congress was clear and the "area" to which TVA was to be confined was ascertainable from conditions which existed on the critical date of July 1, 1957.

But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts "for the sale or delivery of power."

The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to a finding of fact, we consider that it was clearly erroneous. Fed. R. Civ. P. 52(a).

TVA argues that because several maps purporting to disclose the area of its service, which it furnished to the Congressional Committees considering the legislation, showed all of Claiborne County as within said area and did not disclose KU's corridor into Tennessee, it should be assumed that Congress by its Act made all of the County a part of "the area" of TVA. On trial, however, TVA's witnesses conceded that these maps were intended to be only "rough ap-

proximations" of its total area. The evidence disclosed that they failed to portray the numerous places where peninsulas or corridors contiguous to and parts of non-TVA areas intruded across the perimeter of and into the area portrayed as being exclusively that of TVA.

(*b*) *Other evidence indicating the area of TVA-supplied power*

We have detailed above undisputed evidence that KU's corridor which included the Tazewells was contiguous to an area of Kentucky in which KU was not only the primary but the exclusive source of power supply. This was also confirmed by maps annually prepared by TVA to portray its "Transmission System." These maps covered years prior and subsequent to 1957, and subsequent to the effective date of the 1959 Act. In each of these maps, the KU corridor was shown as a continuation of KU's area in Kentucky and not as part of TVA's area. The corridor's boundaries and outline were not precisely delineated and New Tazewell was not shown as within the intruding corridor, but it is not claimed that New Tazewell was in fact outside the corridor. There was also in evidence a detailed map prepared in 1960 by the joint work of engineers for KU and PVA (the "Rowe-Osborne" map) which precisely delineated the line which separated the respective areas of these utilities. The Tazewells were within KU's area which extended north to the Tennessee-Kentucky line and the Tennessee-Virginia line. On the Tennessee side of the Kentucky-Tennessee line are Cumberland Gap and other municipalities in which KU was the exclusive source of power. The TVA Board resolution, however, determined that the "periphery" of TVA's area was along the northerly line of Claiborne County

which is the Kentucky-Tennessee state line—this notwithstanding that the area in which KU was either the exclusive or primary source of electric power lay on both sides of the "periphery" adopted by its Board. Thus the Board "lopped off" from KU's area its corridor extending into Claiborne County and resolved that all of Claiborne County, including the Tazewells, was part of "the area" in which TVA was the primary source of electric power.

Among the map exhibits was one prepared by TVA in 1952, and delivered to KU's power engineers with a letter from one DeMerit, TVA's Chief Power Engineer. The letter described the map as "showing the areas now served by the LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the *Cumberland Gap-Tazewell Section of Tennessee.*" [Emphasis supplied.] The map, Exhibit 36, shows the KU corridor extending without break and with substantial width from KU's area in Kentucky and Virginia southerly to and including Tazewells.[6a]

It appears to us that except for the map presented to the Congressional Committee as "rough approximations," the maps prepared by TVA engineers, or in the making of which they collaborated, and the physical facts could be consistent only with a finding that the Tazewells on July 1, 1957, were outside of an area in which TVA was the primary source of power. We are persuaded also that TVA's "rough approximation" maps were not intended to deal specifically

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[6a] This is the same Exhibit 36 which is attached to the dissent. The dissent asserts that it portrays "KU's view of the same problem * * *." This is true, but as pointed out in the above text, this map was the production, not of KU engineers, but was made by *TVA* engineers to show *their* view of the areas served by the respective utilities.

with KU's relatively small peninsula extending as a part of its total area into Tennessee. Until about 1960 when the activity to have TVA take over the supply of power to the Tazewells commenced, all of TVA's own activities were consistent only with the conclusion we have reached. Its Board's resolution, adopted to sustain its position in this lawsuit, could not change the facts.

We should make clear that we are not deciding whether the involved 1959 Act would forbid TVA from entering into or expanding its service within areas served by private utilities where such areas are but islands within a larger area in which TVA is primary. Tazewell and New Tazewell are not such islands, but are attached to the "mainland" of KU's area of primary service. The fact that a line or lines of PVA may at one or more points enter into this corridor or, as the evidence shows, at one point cross one of KU's transmission lines, does not make islands of Tazewell and New Tazewell. We do not consider that the District Judge's recitation that:

> KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.

was a finding of fact that the Tazewells were "islands."

There was evidence that it would be economically advantageous to consumers in the Tazewells to receive their power from TVA, either directly from PVA or through municipally owned systems. Whether TVA

is in good faith seeking to help the citizens of Tazewell and New Tazewell obtain the benefits which flow from TVA is an irrelevant question here. We hold that the 1959 Act now forbids the involved expansion of TVA.

(c) *Reviewability of TVA Board's determination*

Appellees assert that the District Judge made his own finding of fact on the critical issue, independently of the TVA Board's finding, and that under 52(a) Fed. R. Civ. P., such finding binds us, absent a valid conclusion by us that his finding of fact was clearly erroneous. We read the District Court opinion, however, as accepting the TVA Board's resolution as dispositive of the case, but if his decision in total amounts to a finding of fact, we consider it erroneous within the meaning of the mentioned rule.

As an alternative position, TVA contends that the 1964 resolution of its Board of Directors, made for the purpose of and on the eve of trial, was beyond judicial review. It is clear that such resolution was the product of advice provided by memoranda presented by TVA's Manager of Power, Mr. Wessenauer, and its General Counsel. The "rough approximation" maps which Wessenauer had presented to the Congressional Committees accompanied his memorandum. He advised the Board:

> The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the entire area served by TVA

power would justify the time and expense involved in making the necessary studies.

With reference to his Congressional Committee maps, he said:

> The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA.

The General Counsel's memorandum included the following:

> The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA Act is a responsibility which Congress has placed on the TVA Board.
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> * * * * *
>
> The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.
>
> A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the

Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957,[1] and can properly define as part of the perphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell Counties.

Appellees support their argument on this point by citing cases which hold that where Congress has committed to a government agency the responsibility for making determinations preliminary to executive or administrative action, such determinations are beyond judicial review. We, however, do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957." Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board. If, in fact, the Tazewells were outside the area where TVA was primary, a contrary resolution by the TVA Board could not change the fact.

Leading cases supporting the doctrine invoked by appellees are *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958); *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. Ed. 559 (1840); *United States* v. *Black*, 32 L. Ed. 354 (1888); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 84 L. Ed. 1108 (1940). We will not

[1] H.R. 3460, as originally presented, indicated an intention to use *counties* as the area within which to determine the controlling service area. But such language was eliminated in the final draft.

attempt review of these and other cases cited, other than to observe that they involved the responsibility and right of executive and administrative agencies to make determinations essential to the exercise of granted power. The portion of the 1959 statute before us gave TVA authority to finance its development by issuance of bonds, but imposed specific restraints upon the future activities of TVA. We consider that the language of restraint was clear and did did not need interpretation, discretionary or otherwise. Enforcement of the restraint is a judicial function. *Stark* v. *Wickard,* 321 U.S. 288, 309–310 (1944); *Peters* v. *Hobby,* 349 U.S. 331, 345 (1955); *Leedam* v. *Kyne,* 358 U.S. 184, 188 (1958). The District Judge did hold that the finding of the TVA Board was subject to his review and notwithstanding his reliance on the Board's resolution said:

> It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U.S. 288, 309–310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra,* [252 F(2) 537, (CA 6, 1958) *cert. den.* 358 U.S. 830] *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316.

We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this appeal.

2. KU'S STANDING TO SUE

KU does not have an exclusive franchise and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding

its sale of power into the Tazewells, cities which are outside of TVA's primary area. We are satisfied that the Act's restrictions on TVA expansion were incorporated to protect KU and other established utilities from the destructive consequences of intrusion of TVA power into areas where such utilities had already been established as the primary source of power and which areas were "outside" of TVA's primary area.

The Senate Committee's report reviewing the plan and purpose of H.R. 3460, the bill enacted, recited that among other objectives of its Territorial Limitation was a purpose to "protect the areas now being served by private utilities." *U.S. Code Congressional and Administrative News,* 86th Congress, 1st Session, p. 2008 (1959). Remarks made by members of Congress make clear that concern for the rights of KU and other utilities in like situations prompted the limitations placed on TVA. Such being so, we believe that the courts are open to KU to seek protection of the rights which Congress created for it.

Of the cases relied on by appellees on the question of plaintiff's standing to sue, *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, 82 L. Ed. 374 (1938); *Tennessee Electric Power Company* v. *TVA,* 306 U.S. 118, 83 L. Ed. 543 (1939); and *Kansas City Power & Light Company* v. *McKay,* 225 F(2) 924 (C.A.D.C. 1955) *cert. den.,* 350 U.S. 884, speak most directly to the subject. All of them involve efforts by private utilities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue and the asserted ground for relief in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means

whereby competitors of private utilities has or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surface analogy is immediately dissipated by the fact that in none of them was the plaintiffs' suit planted on a federal statute enacted specifically for the protection of the involved plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds. Without attempting detailed analysis of the facts of each of these cases and the court's reasoning, we recite language from *Tennessee Electric* which we believe most nearly expresses the theory underlying all three of the cases. Speaking of the plaintiffs' assertions, Justice Roberts said:

> This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution.

and Justice Roberts then concludes that "[t]he contention is foreclosed by prior decisions that the damage consequent on competition, *otherwise lawful*, is in such circumstances damnum absque injuria, and

will not support a cause of action or a right to sue." 306 U.S. 139, 140, 83 L. Ed. 550, 551. [Emphasis supplied.]

Relying upon these principles, TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and, therefore, it is no business of KU where these municipal systems obtain their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit.

No precedent answers this question precisely, but we believe that there is ample authority for our affirmance of the District Judge's view that plaintiff had standing to sue. In *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F(2) 537, 544 (C.A. 6, 1958), where the plaintiff bank charged violation of federal and state statutes by the Comptroller of the Currency's grant of authority to open a branch bank, we said:

> As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes * * *. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated.

In *Stark* v. *Wickard,* 321 U.S. 288, 88 L. Ed. 733 (1944) standing to sue the Secretary of Agriculture

by a milk producer who asserted that the Secretary's action offended a statute creating rights in plaintiff was sustained by the Supreme Court which said:

> Here, there is no forum, other than the ordinary courts, to hear this complaint. When * * * definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * *. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States* v. *Morgan,* 307 U.S. 183, 190, 191, 83 L. Ed 1211, 1216, 1217, 59 S. Ct. 795. 321 U.S. at 309–310, 88 L. Ed. at 747–748.

In *Leedon* v. *Kyne,* 358 U.S. 184 (1958), dealing with and sustaining a District Court's jurisdiction to hear a complaint which charged the NLRB with illegal conduct, the Supreme Court said:

> This case, in its posture before us, involves unlawful action of the Board [which] has inflicted an injury on the [respondent]." Does the law, "apart from the review provisions of the * * * Act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. 358 U.S. 188

See also, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Texas & P.R. Co.* v. *Rigsby*, 241 U.S. 33, 39–40, 60 L. Ed. 874, 877 (1916). It would be useless for Congress to include distinct limitations upon the expansion plans of such public corporations as TVA if there was no way to force them to keep within such limitations.

We hold that KU had standing to sue and on the merits should have been accorded appropriate relief. This disposition makes it unnecessary that we consider other contentions made by KU in support of its claim for relief.

Judgment of dismissal is reversed and the cause is remanded for further proceedings consistent herewith.

EDWARDS, *Circuit Judge*, dissenting: The majority opinion would in my view construe statutory restrictions in the 1959 Tennessee Valley Authority Act, 73 Stat. 280 (1959), 16 U.S.C. § 831n–4 (1964), much more narrowly than it appears to me Congress intended. The Tennessee Valley Authority sought authority from Congress to issue revenue bonds to expand its facilities for furnishing electric power within the general area served by TVA. The bill proposed by TVA was opposed vigorously by privately owned power companies whose service areas impinged upon TVA's. As a result of this opposition, when the 1959 TVA Act was passed, it contained language generally restricting the areas which TVA could supply to those which it was serving as the primary source of power on July 1, 1957, and to an area no more than five miles outside the perimeter of such area.

The limiting provision follows:

> Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power

which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside *the area* for which the Corporation or its distributors were the *primary source of power supply on July 1, 1957,* and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act. * * * [Emphasis supplied.] 73 Stat. 280 (1959), 16 U.S.C. 831n–4(a) (1964).

This action is a suit for an injunction by Kentucky Utilities Company against TVA seeking to restrain it from providing electric power to two municipal electric distribution systems in the towns of Tazewell and New Tazewell, Tennessee. The two major parties

agree only on the fact that legal construction is needed for the words "area" and "primary source of power" in the first clause of the portion of 16 U.S.C. § 831n–4, the 1959 TVA Act which we have quoted.

Briefly put, it is the contention of KU that its area of service reaches down from Kentucky into Claiborne County, Tennessee, in a narrow peninsula of service along its transmission line, and that it represented the primary source of power supply on July 1, 1957, for the towns of Tazewell and New Tazewell, Tennessee.

Briefly put also, TVA's position is that TVA's power lines, through its subsidiary, Powell Valley Electric Cooperative, criss-crossed all of Claiborne County on the crucial date of July 1, 1957, and served a portion of the Tazewells and plainly, in TVA's contention, represented the primary source of power for Claiborne County.

TVA also points out factually that its transmission line of Powell Valley cut across KU's transmission line rendering KU's Tazewell facilities an island.

TVA's view of the "area" concerned in this matter is portrayed by its Exhibit 91. [*Infra*, p. 43.]

KU's view of the same problem is dramatically different, as shown in Exhibit 36 [*Infra*, p. 44.]

Although it seems unlikely, both exhibits refer to this same dispute and to the same general geographical locality.

It is clear, as the District Judge who heard this case found, that TVA was the dominant supplier of electric power in Claiborne County while KU was the

dominant supplier of electric power within the city limits of Tazewell and New Tazewell.[1]

It is also clear that neither of these utilities had any exclusive franchise to serve any territory here in dispute. It is also clear that KU had many customers in Claiborne County, while TVA had customers in both Tazewell and New Tazewell on the critical date.

After an interesting review of the Congressional history of the 1959 TVA Act, Judge Taylor concluded:

> The TVA Board of Directors on August 26, 1964 made an official and formal finding to the effect that all of Claiborne County, including

[1] "As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

"On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service." (Quoted from Trial Judge's Memorandum Opinion, Appellant's Appendix at p. 49a–50a.)

the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.

The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

The finding of the Board was made in good faith and supported by substantial evidence.

The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U.S.* v. *Burleson,* 127 F. Supp. 400.

None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

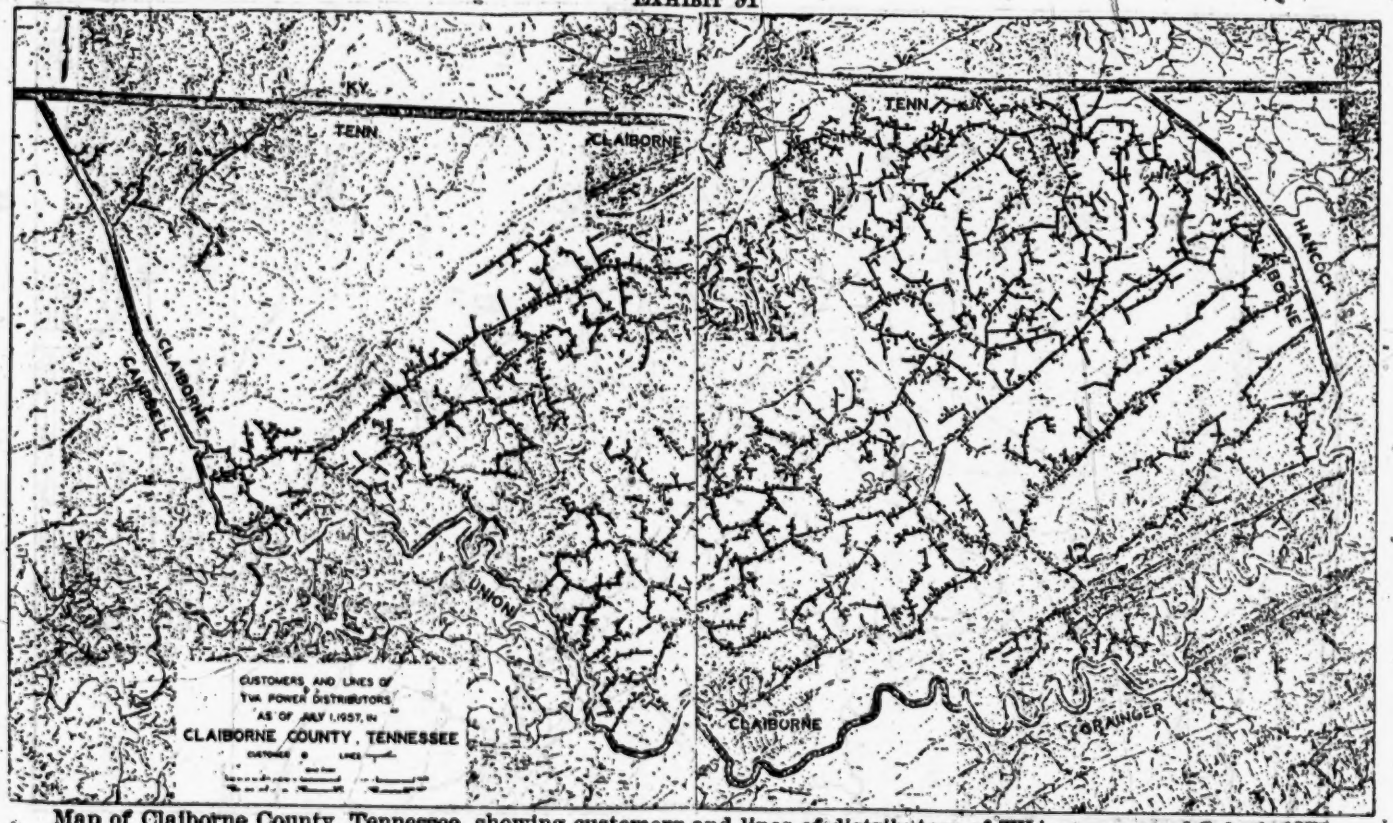
It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint.

The maps to which Judge Taylor refers are before this court. They were before Congress when it passed the disputed legislation. Tazewell and New Tazewell are clearly within both the Tennessee watershed and the perimeter of the TVA service area as it was outlined to Congress. In these cities on July 1, 1957, no private utility had any exclusive franchise, and in fact, TVA was then furnishing power to customers. In addition the cities are located in a county where TVA clearly was the primary source of power on July 1, 1957. Under this set of facts, I do not see how we can properly interpret the 1959 TVA Act as making illegal a finding of fact by the Board of TVA that it was "the primary source of power" for "the area" concerned on July 1, 1957. The 1959 TVA Act and its relevant amendments seem to me to support TVA authority to make this finding. (73 Stat. 280 (1959), 16 U.S.C. 831 (1964). See in particular 16 U.S.C. 831i and 16 U.S.C. 831h–4). Judge Taylor so interpreted the Act and found "substantial evidence" to support the crucial finding.

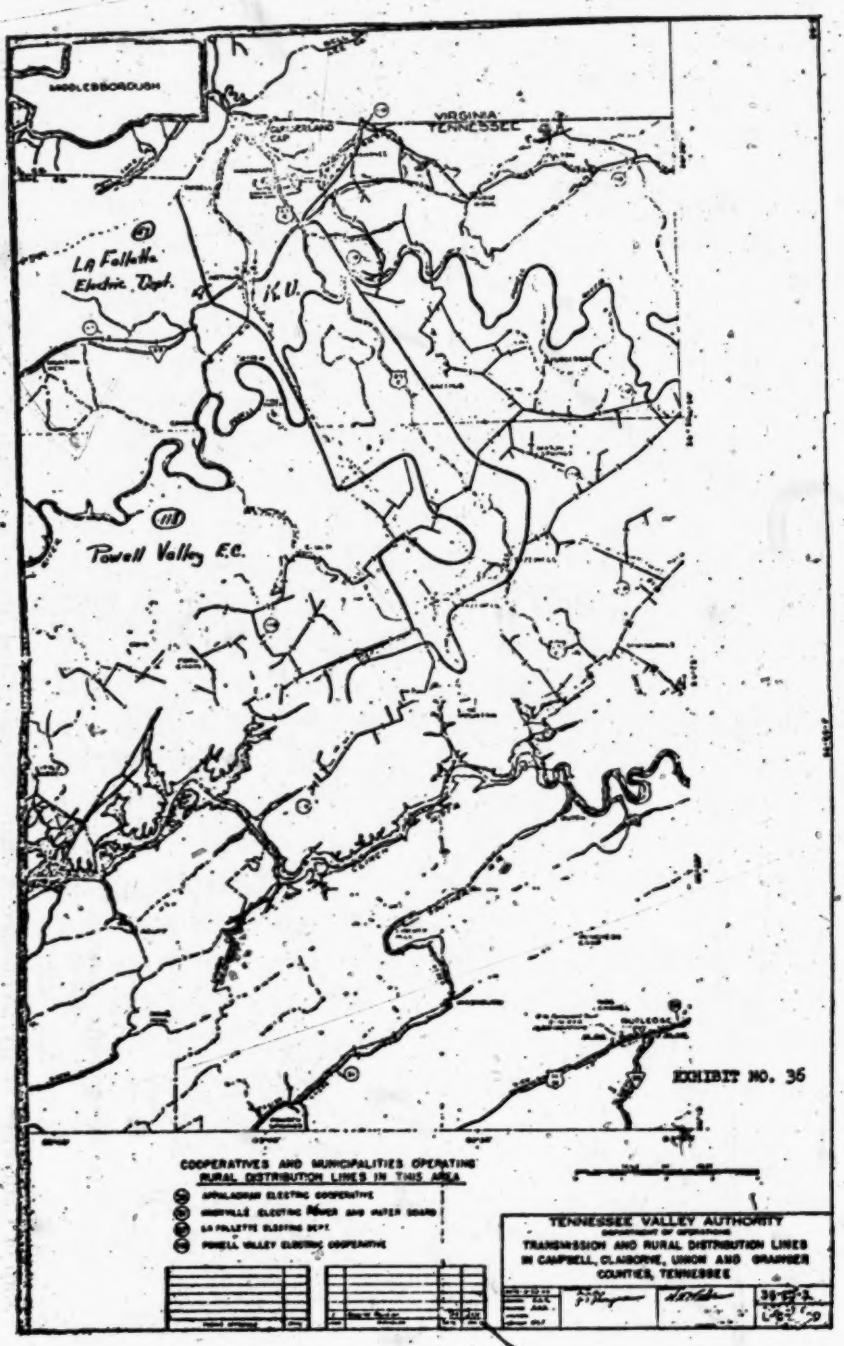
I believe that Judge Taylor's interpretation and application of the statutory language represents both logical construction of the statutory language and compliance with Congressional intent.

I concur with my brothers' view that the 1959 TVA Act should be construed as giving KU standing to bring this suit, but I would affirm the District Judge's order dismissing same for the reasons given above and in his complete opinion.

EXHIBIT 91



Map of Claiborne County, Tennessee, showing customers and lines of distributors of TVA power as of July 1, 1957


MIDDLESBOROUGH
VIRGINIA
TENNESSEE
La Follette Electric Dept.
K.U.
Powell Valley E.C.
EXHIBIT NO. 36
COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA
TENNESSEE VALLEY AUTHORITY
TRANSMISSION AND RURAL DISTRIBUTION LINES IN CAMPBELL, CLAIBORNE, UNION AND GRAINGER COUNTIES, TENNESSEE

APPENDIX B

United States Court of Appeals for the Sixth Circuit

No. 16,491

KENTUCKY UTILITIES COMPANY, PLAINTIFF-APPELLANT

v.

TENNESSEE VALLEY AUTHORITY; POWELL VALLEY ELECTRIC COOPERATIVE; EDWARD J. HARDIN, INDIVIDUALLY AND AS MAYOR OF TAZEWELL, TENNESSEE; JAMES B. DEBUSK, INDIVIDUALLY AND AS MAYOR OF NEW TAZEWELL, TENNESSEE, DEFENDANTS-APPELLEES

Before: O'SULLIVAN and EDWARDS, *Circuit Judges*, and CECIL, *Senior Circuit Judge*.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS, *Clerk*.

A True Copy.

Attest:

(S) Carl W. Reuss,
CARL W. REUSS, *Clerk*.

APPENDIX C

In the United States District Court for the Eastern District of Tennessee, Northern Division

Civil Action No. 4861

KENTUCKY UTILITIES COMPANY

v.

TENNESSEE VALLEY AUTHORITY, POWELL VALLEY ELECTRIC COOPERATIVE, EDWARD J. HARDIN, INDIVIDUALLY AND AS MAYOR OF TAZEWELL, TENNESSEE AND JAMES B. DEBUSK, INDIVIDUALLY AND AS MAYOR OF NEW TAZEWELL, TENNESSEE

Memorandum

Plaintiff, Kentucky Utilities Company, hereafter referred to as KU, seeks injunctive relief against defendants, Tennessee Valley Authority, hereafter referred to as TVA, Powell Valley Electric Cooperative, hereafter referred to as Powell Valley, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, to prevent them from taking or attempting to take its electric customers in the area of Tazewell and New Tazewell, Claiborne County, Tennessee, and also a judgment for damages for loss of business resulting from defendants' alleged wrongful acts.

Jurisdiction is based on 28 U.S.C. Sections 1331, 1332, 2201 and 2202.

The action against Mayors Hardin and DeBusk in their individual capacity was withdrawn during the trial.

KU seeks to enjoin TVA from selling or delivering electric power to Powell Valley, a distributor of TVA power, and enjoin Powell Valley from purchasing or receiving from TVA electric power for resale in either of the municipalities of Tazewell, Tennessee or New Tazewell, Tennessee, other than to customers and locations receiving electric service from Powell Valley on October 30, 1963. Relief is also sought against the Mayors of the two towns in their official capacities to prevent them from interfering with KU customer contracts.

Plaintiff contends that commencing in 1961 or 1962 and continuing to the present time, all of the defendants have combined and conspired and acted together to appropriate to themselves all of the electric utility customers, business, revenues and contracts of KU for electric service within the two Tazewells, and that several dozen customers have been lost by KU as a result of the conspiracy.

The claimed overt acts consist of numerous meetings held by the representatives of defendants whereby plans were devised and carried out through acts commencing October 30, 1963, to take all of the business of KU in the two municipalities.

Plaintiff further contends that the TVA in furnishing electric power and in agreeing to furnish electric power to Powell Valley, which sells to the two municipalities and which has agreed to sell at retail to customers located in the corporate limits of the municipalities, violated 16 U.S.C. Section 831N–4 (here after called the 1959 TVA Act), which provides in pertinent part as follows:

"* * * Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

The Act became effective August 6, 1959. It is to be noted that thereunder the TVA, except for specified exceptions, was not to contract for the supply of power "outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

KU insists that TVA was not the primary source of power supply in the areas of the two municipalities on July 1, 1957 within the meaning of the Act but that the municipalities were receiving electric service from KU on that date and on the date the Act became effective.

KU further contends that there was a common law conspiracy of the defendants to interfere with the contractual relations between it and its customers in the two municipalities by inducing such customers to terminate their contracts with KU in violation of the 1959 TVA Act.

TVA contends that plaintiff has no standing to maintain the action as the complaint presents no justiciable controversy. That KU does not have an exclusive franchise to furnish electric service in the municipalities and has no common law or statutory right to be free from competition of TVA and its distributors. That the 1959 TVA Act does not expressly confer upon KU the right to maintain an action based upon alleged violations of the Act by TVA and, in the absence of such provision KU is without standing to bring the action.

TVA contends further that the findings of its Board that the two municipalities are within the TVA service area is not subject to judicial review if the finding was made in good faith and supported by substantial evidence and that the Board's action met these requirements.

TVA also contends that it has made no contract since the effective date of the Act which would have the effect of changing the relationship of TVA or its distributors with respect to the source of power supply in the two municipalities.

TVA says that it and its distributors were the primary source of power supply in the two Tazewells

on July 1, 1957, within the meaning of the 1959 TVA Act.

TVA denies that it unlawfully induced or combined to induce customers of KU to terminate, breach, or sever alleged contracts with KU for electric service.

TVA asserts that the citizens of Tazewell and New Tazewell, Tennessee have a right to obtain electric service from whomever they please and that KU has no right to be free from lawful competition.

The two Mayors, and the municipalities which they represent, adopted the contentions made by TVA and in addition they contend that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities. They assert that the municipalities have the right under the Tennessee law to establish their own electric systems and that the citizens acting through their elected officers have the right to choose between the TVA current and the current furnished by private institutions.

The defenses of Powell Valley to the complaint are the same as the other defendants insofar as applicable.

STANDING OF PLAINTIFF TO MAINTAIN ACTION

If plaintiff has proved the charges of common law conspiracy and a violation of the 1959 TVA Act and has sustained injuries therefrom, it has standing to maintain the suit. *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F. 2d 537, cert. denied, 358 U.S. 830 (C.A. 6); *Whitney National Bank,* v. *Bank of New Orleans & Trust Co.* (D.C. Cir.), 323 F. 2d 290, cert. granted, 376 U.S. 948; *Commercial State*

Bank of Roseville v. *Gidney,* 174 F. Supp. 770, affirmed 278 F. 2d 871 (D.D.C.).

The cases cited by TVA of *Alabama Power Company* v. *Ickes,* 302 U.S. 464, *Tennessee Electric Power Company* v. *Tennessee Valley Authority,* 306 U.S. 118 and *Kansas City Power & Light Company* v. *McKay,* 225 F. 2d 924, are distinguishable from the case under consideration. Each of these cases involved a suit by a private utility to enjoin officers or agencies of the United States from making contracts which would have the effect of increasing competition between the private retailer and the public power agencies. The public power agencies' competition was legal in itself, but was attacked on the basis that either the statutes authorizing the activities of the various officers and agencies were unconstitutional or that the officers and agencies had exceeded their authority under the Act. In each case, it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise; hence, no common law or statutory rights of the plaintiffs had been invaded. The plaintiffs, therefore, had no standing to question the authority of the various officers and agencies of the United States.

In *Alabama Power Company* v. *Ickes, supra,* the Court likened the position of the plaintiffs to that of a taxpayer suing to enjoin the expenditures of federal funds, which could not be done under the decision of *Massachusetts* v. *Mellon,* 262 U.S. 447. The distinction in these cases is that the competition was shown to be legal while in the case under consideration it is claimed that the competition is illegal by reason of the unlawful conspiracy and the alleged violation of the 1959 TVA Act. See: *Texas & P.R. Co.* v. *Rigsby,* 241 U.S. 33, 39–40; *Wheeldin v. Wheeler,* 373 U.S. 647;

Hooper v. *Mountain States Securities Corporation,* 282 F. 2d 195, cert. denied, 365 U.S. 814; and *Dann* v. *Studebaker-Packard Corporation,* (C.A. 6) 288 F. 2d 201.

FINDINGS OF TVA BOARD SUBJECT TO JUDICIAL REVIEW

The TVA Board on August 26, 1964, some three weeks before the trial, found and determined that all of Claiborne County, Tennessee (within which County the two municipalities are located) is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The TVA was first contacted by the Claiborne County Chamber of Commerce in 1961 for power. One or more members of the TVA legal staff was present at this meeting. The representatives were advised by TVA that there was a legal question as to whether TVA power could be supplied in the municipalities under the 1959 TVA Act and that a court decision would be helpful in resolving the question. Mr. Wessenauer testified in a discovery deposition that the TVA lawyers had advised him that under the Act TVA power could be supplied in Tazewell and New Tazewell and that so far as he was concerned that was the end of it. He also testified that the TVA left it up to the distributors to determine that they were staying within the boundaries set by the 1959 Act and that he thought this was a factor that should be taken into consideration by the TVA Board in determining the TVA area. He stated that if he were fixing the lines he would wipe out the pockets inside the TVA service area. That he had not been advised as to the provisions of the Act with respect to "islands."

The factual presentation of Mr. Wessenauer, supplemented by the opinion of Mr. McCarthy, Chief Counsel, and its independent study, caused the Board to conclude that the two towns were within the TVA service area on July 1, 1957.

The issue before the Board was one of fact and law. Proper interpretation of the 1959 Act was the law issue, and the determination of the area supplied by TVA and the area supplied by other sources was the issue of fact.

It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U.S. 288, 309–310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra; Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316.

The case of *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, cited by the defendants involved the Walsh-Healy Act which expressly provided for hearings to be held by the Secretary of Labor at which evidence would be introduced and on the basis of that evidence a wage determination would be made. The question of the size of "localities" was necessarily one of the subjects upon which the Secretary was required to act in each case and make a determination. The decision by the Secretary was a decision of Congress made by delegated authority.

Another case cited, *Re U.S. ex rel TVA* v. *Welch,* 327 U.S. 546, 554, is distinguishable from the present case in that the discretionary power to determine what lands should be condemned is expressly provided by the TVA Act. Title 16 U.S.C. 831x.

United States v. *Carmack,* 329 U.S. 230, 242–243, involved the selection of sites to be condemned for post offices. The Court noted that within its legisla-

tive power, Congress had the right to choose or reject the proposed post office site by direct action.

CONSPIRACY CHARGE

In support of its charge of conspiracy, KU contends that when the question of TVA power for the two municipalities was considered in 1961, TVA doubted that its power could be distributed in the municipalities without violating the 1959 Act and that a court decision should be obtained to clarify the issue. It was made clear by representatives of TVA and Powell Valley at this meeting that Tazewell and New Tazewell could not feasibly establish an electric system of their own but would have to depend on Powell Valley.

After the initial consideration of this question, KU contends that TVA officials cooperated in a move by the Chamber of Commerce and the two municipalities to buy TVA power for Tazewell and New Tazewell without getting a court construction of the Act. From that point on, various problems, in addition to the territorial limitations contained in the 1959 Act, were encountered.

KU asserts that it was known that KU would not voluntarily sell its facilities in the area of the municipalities and that the defendants planned to use various forms of threats and duress upon KU to force the sale of its facilities. That is was planned to use the Tennessee Public Service Commission as a lever to force the reduction of KU's rates in the area and to use threats to duplicate the KU system by a parallel system.

It further contended that Powell Valley was known to be the only feasible agency to supply TVA power in the two Tazewells from an economic standpoint but

was blocked from doing this for several reasons: First, there was an agreement between Powell Valley and KU as to the boundaries to be served by these utilities. The 1959 Act encouraged such agreements. After several meetings of the defendants in 1961 and 1962, Powell Valley gave notice of termination of the 1958 agreement between it and KU to be effective in 1963. The 1952 agreement between KU and Powell Valley which prevented the taking of each other's customers could not be terminated according to its terms without terminating the whole tri-party agreement under which KU supplied power into the Tazewell and New Tazewell area for its own customers and also for use by Powell Valley. This was an advantageous arrangement to Powell Valley and termination was not desired.

KU asserted that REA had a policy against duplicating facilities and the use of funds of the cooperative borrower for the construction of duplicating facilities.

That Powell Valley feared that if KU was pushed out of the Tazewell and New Tazewell area, KU itself might terminate the 1952 tri-party agreement under which KU supplied power to TVA for use by Powell Valley. If this should happen, Powell Valley customers in the area would be left without a source of TVA power. TVA put to rest this fear when the TVA Board promised that some source of power would be supplied if the parties moved along with the plan and supplanted KU in the area.

That because of many problems, a decision was made by defendants to use a so-called municipal system initially to displace KU in Tazewell and New Tazewell and the surrounding area. It was recognized that a municipal system was not feasible but that it might be utilized as an initial arrangement to

displace KU, after which Powell Valley would take over. Powell Valley service lines were to be used in getting its service to this small initial municipal system. While the two cities were carrying on the so-called municipal system, Powell Valley would actually do the operating, meter reading, and servicing.

It was KU's contention that TVA and Powell Valley suggested that the Mayors of the two cities present resolutions under which the Board of Aldermen of the cities simply turned the whole matter of establishing and operating this system or systems over to the Mayors to handle as the course of expediency dictated.

That in October, 1963, Powell Valley's contractor and engineer, acting under ostensible contracts with the Mayors, moved in and started disconnecting KU's customers who were induced by the foregoing arrangement to switch, and connected them to Powell Valley's lines. The municipal system that was thus constructed consisted largely of drop service lines to individual customers, which lines were connected to the nearest lines of Powell Valley. In several instances, one or more poles and a transformer were required to connect the customer to Powell Valley lines. After twenty-four customers of KU were appropriated, this action was instituted and the further taking of customers ceased. The contractor discontinued his work for the municipalities.

In the Court's opinion the evidence fails to show a conspiracy upon the part of any of the defendants. The evidence shows that the retail rates for electricity to residental and commercial customers in effect for KU prior to the institution of this suit were substantially higher than those for the TVA power distributors, and under applicable rate schedules the disparity increased with increased use. As a consequence,

some of the witnesses testified that within the two towns the value of properties served by TVA electricity was substantially and uniformly higher than similar properties served by KU. The rate disparity created discontentment among some of the residential and industrial consumers and a number of citizens of the two towns appealed to their civic leaders and to their elected officials to explore the possibility of lower cost electricity. Numerous meetings were held among representatives of the municipalities, Powell Valley, TVA and various civic groups to see what could be done towards getting TVA power beginning in 1960. At these meetings, TVA representatives advised that TVA could not enter into a power contract with either of the municipalities because they were so small that it would not be economically feasible for them to build and maintain their own separate distribution system and undertake the responsibilities of a TVA distributor. The representatives of the towns were advised to discuss their problems with Powell Valley to see if suitable arragnements could be made to obtain their electricity from Powell Valley.

Powell Valley advised the municipalities that it would be unable to obtain REA financing for construction of duplicating distribution lines within the towns and, therefore, the towns would have to buy or build their own systems.

At a meeting with the TVA Board of Directors on February 4, 1960, the Board advised representatives of Middlesboro, Kentucky, and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. At a meeting on November 27, 1962, TVA gave representatives of the towns and Powell Valley assurance that TVA would continue

to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area.

The municipalities then sought technical assistance and advice from the Legal Consultant on Municipal Law at the University of Tennessee as to how they might go about financing their own municipal electric systems. They employed an attorney who specialized in this field to advise and consult with them. After considering the advice and suggestions given them, the two towns, through their authorized officials, circulated a petition to the citizens of the towns to determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the towns of their own municipal electric systems. Following the circulation of these petitions, the town councils passed resolutions on October 21, 1963, authorizing the Mayors of the two towns to take the necessary steps to purchase or build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing of the customers in the name of the two towns. Powell Valley was to sell electricity to the two towns at wholesale rates plus a small charge for transmitting the electricity, and it was also agreed that the rates charged the city customers would be no higher than those charged by Powell Valley to its customers under its contract with TVA.

Beginning in October, 1963, a number of residents of the two towns who were then receiving service from KU made application to the towns for electric service and notified KU to discontinue service to them and to disconnect their meters. On October 31, 1963, until the filing of this suit on November 7, 1963, eighteen former customers of KU had terminated their service with KU and became customers of the two towns.

The towns of Tazewell and New Tazewell have a legal right to own and maintain their own municipal electric systems and have a right to compete with KU for the customers in those towns and the offering to serve those customers at lower rates than those charged by KU did not constitute an unlawful interference with the customer contracts of KU in the absence of fraud. The evidence fails to show any fraud upon the part of any of the defendants. 86 C.J.S. *Torts*, § 44c, (1954); Annot., 84 A.L.R. 63 (1933); Annot., 26 A.L.R. 2d 1259 (1952); *Fairbanks, Morse & Co.* v. *Texas Electric Service Co.*, 63 F. 2d 702 (C. A. 5, 1933); *Citizens' Light, H. & P. Co.* v. *Montgomery Light & W.P. Co.*, 171 Fed. 553 (M.D. Ala. 1909); *Wolf* v. *Perry*, 339 P. 2d 679 (N.M. 1959); *Emery* v. *A. & B. Commercial Finishing Co.*, 315 P. 2d 950 (Okla. 1957); *Augustine* v. *Trucco*, 268 P. 2d 780 (Cal. App. 1954).

The consumers in Tazewell and New Tazewell who have discontinued their service with KU had a legal right to discontinue such service and to take service from the municipalities. *Cass County Electric Coop.* v. *Otter Tail Power Co.*, 93 N.W. 2d 47 (N.D. 1958); *Blue Ridge Elec. Membership Corp.* v. *Duke Power Co.*, 128 S.E. 2d 405 (N.C. 1962).

WAS TVA THE PRIMARY SOURCE OF ELECTRIC POWER IN TAZEWELL AND NEW TAZEWELL ON JULY 1, 1957?

KU contends that the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is the actual geographical area where the distribution facilities and customers of TVA and its distributors were located on that date; that if other utilities were the actual source of power, such areas were excluded from the TVA areas although they may have been wholly or partially surrounded by areas for which TVA or its distributors were the actual source.

KU argues that if a perimeter is to be known defining primary service area, the location of such perimeter can be properly fixed only by such facts as the facilities, customers and the rendering of service. Where adjacent service areas of private utilities form peninsulas or corridors or other indentations into the service area of TVA, such perimeter must follow these factual service areas and thereby exclude such peninsulas or corridors from the primary service area of TVA.

KU insists that all of the maps filed in evidence show that TVA or its distributors were not the primary source of power in these municipalities on July 1, 1957, and that a dozen TVA maps in evidence draw the continuous perimeter of TVA's primary service area so as to dip down into Claiborne County south of Tazewell and exclude, from TVA's area, KU's service area extending down from KU's adjoining service area in Kentucky. Thus, it argues, TVA's primary service area does not include, and cannot lawfully be described so as to include these peninsulas of established service of adjacent private utilities.

KU has insisted that on July 1, 1957, there were in excess of 70 municipalities served by private power companies, which were entirely surrounded by TVA service and that these islands or pockets of private power service were referred to in the legislative history of the 1959 Act. KU contends that it is inconceivable that anyone could conclude that TVA was the primary source of power supply within these municipalities on July 1, 1957, or that these municipalities could be considered in the area for which TVA was the primary source of power supply on such date.

TVA asserts that these 70 municipalities which plaintiff refers to as being within the primary area are mostly small unincorporated communities which are not municipalities at all. 62 C.J.S. *Municipal Corporations,* § 1d (1949).

KU points out that the fact that TVA's distributor, Powell Valley, on July 1, 1957, supplied 16 customers in KU's defined service corridor in Claiborne County outside of Tazewell and New Tazewell, and 28 customers within the towns, does not affect the conclusion that KU was the primary source of power supply in the defined corridor including the two towns. That Congress recognized that there might be areas where TVA distributors supplied some customers but were not the primary source of power supply. Such areas, it argues, including the KU corridor and the two towns, therefore, are not part of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Com-

mittee of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the primary area where TVA or its distributors had generally established electric service on July 1, 1957.

The statute provides in part:

> * * * the Corporation shall make no contracts * * * making the Corporation or its distributors * * * a source of power supply outside the area for which the Corporation or its distributors were the *primary source of power* supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area * * * [Emphasis added.]

and that

> Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had *generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.* [Emphasis added.]

The Court had grave doubt during the trial as to whether the last quoted paragraph referred to the primary area, but is now convinced that it refers to the area in which TVA had established electric service outside of the 80,000 square mile primary area and the additional five mile strip.

The words "Nothing in this subsection shall prevent" appears to be an additional grant of power to serve an area not covered by the preceding paragraph relating to the primary area and the five mile strip, rather than a limitation on the power to serve the primary area.

If the statutory language is clear, it may be given effect in accordance with its provisions without resort to legislative history. *Caminetti* v. *United States,* 242 U.S. 470, 485; *Osaka Shosen Line* v. *United States,* 300 U.S. 98, *U.S.* v. *Oregon,* 366 U.S. 643, 648. But the legislative history supports what we believe to be a logical reading of the language of the Act.

We are told in the briefs that the Senate passed a bill in 1957 which would have permitted TVA to serve the whole of any county lying partly within TVA's existing service area or the Tennessee watershed, which would have permitted an increase in the area served by TVA from 80,000 to 105,000 square miles. That the bill passed by the House in 1959 would have limited TVA to its existing service area. That the task before the Senate in 1959 was to work out a compromise between these two proposals.

The report of the Senate Committee rejected the term "service area" because it was "nebulous" and because some of the members felt that it would prevent TVA distributors from serving "small areas served by private power entirely surrounded by the lines of TVA distributors" and "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."[1]

[1] "Under the original TVA Act, Congress provided that the area in which TVA power should be made available would be determined, first by the desire of the people, and second by the economic and engineering feasibility of providing service. The term 'service area' is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers. Although there has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area

Senator Randolph expressed the view that TVA should be encouraged to serve any islands that existed within its geographical operating area as it existed on July 1, 1957.[2]

Senator Randolph and Senator Talmadge sponsored the territorial amendment which was adopted on the Senate floor. If Senator Randolph believed that TVA should be encouraged to serve islands of private power company service within its operating area, it is not likely that he would have sponsored an amendment whose language prevented TVA from rendering service within the primary area.

Senator Cooper objected to the provisions of the Randolph–Talmadge amendment prohibiting service in a municipality outside its primary area of service as he felt that small municipalities near the periphery

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limitation was required. Others believed, however, that the stabilization area should be defined and limited by law.

* * * * * *

"* * * The area where each distributor sells power is determined by community growth and the relationship between neighboring distributors. Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

"The committee was of the opinion that the language of the House bill would invite litigation any time that a distibutor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds of TVA." [From Report of Senate Committee, H.R. 3460, Report No. 470, pp. 8, 9.]

[2] "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." [Supplemental views of Mr. Jennings Randolph on H.R. 3460, p. 56.]

should be allowed to obtain TVA power. He apparently had no question about its authority under the amendment to serve municipalities inside the periphery.[3]

Representative Davis, the House floor manager for the bill, when explaining the effect of the Senate version stated that the Senate bill drew a line around the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.[4]

Statements of sponsors of the bill rather than opponents are usually looked to for legislative history. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 395; *Duplex Co.* v. *Deering*, 254 U.S. 443, 474–75.

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[3] "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." [105 Cong. Rec. 13052.]

* * * * *

"I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.

"Nevertheless, if my motion to strike shall be defeated, I will vote on final passage for the bill, because I have sponsored self-financing from the outside. I respect the service of private utilities in my own State. I have stood for the right of the people in small communities and cooperatives near the TVA area to have some voice in their choice of power supply." [105 Cong. Rec. 13053.]

[4] "As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area." [105 Cong. Rec. 14114 (1959).]

Representative Vinson, an opponent of the bill, felt that the territorial limitations in the Senate bill were more generous to TVA than that of the House bill, but he felt that the limitations in the Senate bill could be justified.[5] He recognized that TVA would have full authority to supply the full power requirements of the primary area.

Representative Scherer, an opponent of the bill, understood that TVA could serve areas already receiving power from another source.[6]

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[5] "While the territorial limitation by the Senate is more generous to TVA than that of the House, I believe it can be justified. I think, therefore, it is safe to say that this amendment proposed and adopted by the other body, if adopted by the House and enacted into law, will provide a fair and reasonable limitation under which TVA will be allowed to increase its power generating capacity to meet the increased requirements within the area delineated by the amendment, and at the same time give reasonable protection to the privately owned systems, and their investors, and to the municipalities and other governmental organizations dependent upon the privately owned systems as an indispensable source of tax revenue." [105 Cong. Rec. 14122 (1959).]

[6] "However, the total area of such 5-mile extension beyond the present periphery greatly exceeds the 2½ percent or 2,000-square-mile limitation provided by the Senate bill. Therefore, TVA during the next few years can pick and choose as it sees fit in this 5-mile extended area such spots as it desires until the 2½ percent or 2,000 square miles have been reached.

"One can readily see that in some places the present periphery will not be extended at all. In other places it may be extended 1 mile beyond the present periphery; in other places, 2 miles or 3 or 4 miles. TVA will pick and choose the best and most lucrative spots in this 5-mile area whenever its gets around to it. In the meantime, private power companies certainly will hesitate to extend their service to anyone within the 5-mile area because there will be no assurance that TVA might not the next day decide to take over that particular area." [105 Cong. Rec. 14125 (1959).]

The maps filed as exhibits in this record, Exhibits 94, 95 and 96, and used by TVA witnesses before the Congressional Committee, show that Claiborne County was within TVA's primary service area. One of the maps was presented by KU (Ex. 92) which showed all of Claiborne County in the primary area except a small mountainous part. However, KU filed another map, Exhibit 100, which shows that the Tazewells were served by KU. This map also shows facilities of KU, including tranmission lines that run from Bell County, Kentucky, southeast through the two Tazewells. KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.

As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957, Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957, for LaFollette) was $902,999.17 as against KU investment on June 30, 1957, of $457,947.93.

On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell

Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service.

During the month of June, 1957, in Tazewell, KU supplied 118,737 KWH of electricity while Powell Valley supplied 11,368 KWH, and in New Tazewell KU supplied 116,645 KWH compared to 3,024 KWH supplied by Powell Valley. Considering the two towns together, KU supplied a total of 235,382 KWH to Powell Valley's 14,392 KWH. KU thus supplied 94.2% of the KWH of electricity consumed in these two towns during June, 1957. During the month of July, 1957, in Tazewell KU supplied 106,647 KWH to Powell Valley's 11,410, and in New Tazewell KU supplied 121,440 KWH to Powell Valley's 3,356. In the two towns, KU thus supplied 228,087 KWH during this month to Powell Valley's 14,766 KWH. In July 1957 KU thus supplied 93.9% of the electric energy consumed in the two towns.

On August 6, 1959, the day the Act became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31.

As of July 1, 1957, KU supplied electric energy to 1,278 customers outside of the municipalities. In 1963, a 34.5 KV transmission line of KU was rebuilt to a 69 KV which is now owned, maintained and operated by KU within this corridor of KU's service area.

On October 30, 1963, the customers of TVA suppliers had increased to over 100 in the municipalities.

The town of Tazewell was incorporated on November 17, 1954, and the town of New Tazewell was incorporated on November 19, 1954. KU and its predecessors had been serving the incorporated areas at least as early as 1920.

In 1952, prior to the enactment of the TVA Act of 1959, KU, TVA and Powell Valley entered into an agreement with respect to means of supplying the loads of KU and Powell Valley. Powell Valley had been serving Caiborne County since 1940. KU and Powel Valley by letter agreement on January 8, 1958, agreed that neither party would serve any customer at any given location, which location was taking service from the other party; that any new load would be served by the party whose facilities were closest to the load and that the parties would consult with each other in an honest effort to resolve any differences on an equitable basis. The letter agreement provided it should remain in effect for a period of five years and should continue from year to year subject to the right of either party to terminate at the end of any annual extention.

Maps were prepared defining the respective areas. For a number of years, the maps were used to resolve questions which arose as to service to particular customers. This agreement was terminated by Powell Valley some time in 1962 or 1963.

The TVA Board of Directors on August 26, 1964, made an official and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the

Committees of Congress by the witnesses for TVA.

The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957, is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

The finding of the Board was made in good faith and supported by substantial evidence.

The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U.S. v. Burleson,* 127 F. Supp. 400.

None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint.

(S) ROBT. L. TAYLOR,
United States District Judge.

APPENDIX D

TENNESSEE VALLEY AUTHORITY ACT

Section 10, 11, 12, 15d(a), 48 Stat. 64 *et seq.*, as amended and added, 16 U.S.C. §§ 831i, 831j, 831k, 831n–4(a)

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to con-

struct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further,* That the board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further,* That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction. [48 Stat. 64, as amended, 16 U.S.C. 831i.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and

sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 State 64–65, 16 U. S. C. 831j.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided,* That if any State, county, municipality, or

other public or cooperative organization of citizens or farmers, not organized or doing business for profit but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for

profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65–66, 16 U.S.C. 831k.]

SEC. 15d. (a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $750,000,000 [1] outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this Act, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise

[1 In 1966, increased to $1,750,000,000 by P.L. 89–537.]

specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation

had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: *Provided further,* That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this Act shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing

the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Nothwithstanding the provisions of section 26 of this Act or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this Act, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law. [As added, 73 Stat. 280, and amended, 73 Stat. 338, 16 U.S.C. 831n-4(a).]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 962

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, and
JAMES B. DEBUSK, as Mayor of New Tazewell, Tennessee, - - - - - *Petitioners,*

v.

KENTUCKY UTILITIES COMPANY, - *Respondent.*

No. 1056

POWELL VALLEY ELECTRIC COOPERATIVE, - *Petitioner,*

v.

KENTUCKY UTILITIES COMPANY, - *Respondent.*

No. 1063

TENNESSEE VALLEY AUTHORITY, - *Petitioner,*

v.

KENTUCKY UTILITIES COMPANY, - *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI.

This Brief is filed on behalf of the respondent, Kentucky Utilities Company (hereafter called "KU"), in opposition to the Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Cir-

cuit previously filed herein by Edward J. Hardin and James B. DeBusk as Mayors of Tazewell and New Tazewell, Tennessee, respectively (hereafter referred to as "the Cities"), Powell Valley Electric Cooperative (hereafter called "Powell Valley"), and Tennessee Valley Authority (hereafter called "TVA").[1]

THE STATUTE INVOLVED.

The pertinent provisions of Section 15d(a) of the Tennessee Valley Authority Act, Title 16 USC § 831n-4(a)[2] were set forth in the Petitions for Certiorari previously filed herein and are reprinted in the Appendix to this Brief (*infra,* p. 3aa).

THE QUESTIONS PRESENTED.

The 1959 TVA Act expressly prohibits TVA from making contracts which would have the effect of making TVA or TVA distributors a source of power supply outside the area for which TVA and its distributors were the primary source of power supply on July 1, 1957. In 1963, a TVA distributor, Powell Valley, pursuant to arrangements with TVA, began supplying electric power to customers in the cities of Tazewell and New Tazewell, Tennessee, which customers (1) had been previously served by KU, and (2) were located in a part of a geographically contiguous area comprising a small part of northeastern Tennessee and a large part of Ken-

[1]The Petitions for the Cities, Powell Valley, and TVA are the cases numbered 962, 1056 and 1063, in the October, 1966 Term of this Court.

[2]Hereafter called the 1959 TVA Act.

tucky served exclusively by KU and not served by TVA or its distributors on July 1, 1957 or any time prior or subsequent thereto up to 1963. The questions presented are:

1. **Where the facts as to the location of customers and facilities are not in dispute, is a determination by the TVA Board of Directors that TVA was the "primary source of power supply," within the meaning of the 1959 TVA Act, in that area of Claiborne County, Tennessee, not served by TVA on July 1, 1957, properly subject to judicial review?**
2. **Whether the Court of Appeals correctly construed the provisions of the 1959 TVA Act as it applied to the undisputed facts of this case respecting the service area of KU and of the TVA distributors in Claiborne County, Tennessee.**

STATEMENT OF THE CASE.

KU is a public utility supplying electric service in a large part of the State of Kentucky from the Mississippi River eastward to the eastern border of Kentucky and extending into a part of northeastern Tennessee adjacent to Kentucky. From 1920 to the present day KU and its predecessor corporation have been the sole supplier of electric service in that area of Claiborne County, Tennessee, extending from the Kentucky-Tennessee border at Cumberland Gap, Tennessee, south and east in a corridor approximately 15 miles long, which corridor includes all but a small part of the cities of Tazewell and New Tazewell, Tennessee. Within this

area or corridor KU had on July 1, 1957, and now has, extensive transmission facilities and a distribution network serving an unbroken line of customers down the highway from the Kentucky border at Cumberland Gap to and including the Tazewells and on beyond into the area south of New Tazewell.[3]

In October, 1963, Powell Valley began rendering electric service to certain customers within the Tazewells who had previously been receiving service from KU.[4] KU thereupon instituted this action to enjoin the supplying of TVA power to any customers in the Tazewells not previously being supplied by TVA power.

On August 26, 1964, some three weeks before the trial of the action in the District Court, the TVA Board of Directors adopted a "resolution" purporting to determine that all of Claiborne County, Tennessee, was within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, within the meaning of the 1959 TVA Act.

The District Court held that KU had standing to maintain the action and that the resolution of the TVA Board was subject to judicial review but concluded "We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957." The Court of Appeals reversed, holding that the

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[3]App. 133a-136a (References to the Appendices filed in the Court of Appeals will be denoted "App." followed by the page number).

[4]In some instances the electric service was rendered by Powell Valley under contract with the Cities who had recently established a municipal electric system.

area in question was outside the area for which TVA was the primary source of power supply within the meaning of the 1959 TVA Act and that "the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on appeal."[5]

REASONS FOR DENYING THE WRIT.

1. The Court of Appeals Followed the General Rule Respecting Judicial Review of Administrative Action Asserted to be Contrary to Statutory Limitations on Agency Powers.

The basic contention urged by the petitioners for the granting of certiorari in this case is that the Court of Appeals improperly exercised its function of judicial review in holding that the supplying of the TVA service in question was contrary to the prohibition on geographic expansion of TVA service contained in the 1959 TVA Act. Petitioners contend that the proper construction and interpretation of this statutory limitation on the powers of TVA is a matter to be determined by the Board of Directors of TVA, and not subject to review by the Courts.

The area limitation provisions of the 1959 TVA Act are a plain prohibition against service by TVA or its distributors outside the defined TVA area. The sole purpose of the provision is to prevent geographic expansion of TVA supplied electric service, in com-

[5]The Opinions of the Courts below are set forth in the Appendices to the Petitions for Certiorari.

petition with other utilities, except to the limited extent permitted by the Act. There are no provisions in the Act which either expressly or by implication delegate any authority to the TVA Board of Directors to make binding administrative determinations as to what is or is not in the TVA area as defined in the statute.

Certainly, the TVA Board has broad discretionary power in the conduct of the various operations entrusted to it by Congress. On the other hand, there is no statutory basis for a holding that the TVA Board has the discretion to make a binding determination on the question of whether it is engaging in activity expressly prohibited by Congress, *i.e.*, entering into contracts for the sale of power for use outside the permitted area of TVA service.

It is well settled under the decisions of this Court that the determination of whether an administrative agency has exceeded its statutory authority is a proper judicial function. *Stark* v. *Wickard,* 321 U. S. 288. Particularly is this true in those cases where an express statutory limitation on agency powers is involved. *Peters* v. *Hobby,* 349 U. S. 331; *Leedom* v. *Kyne,* 358 U. S. 184. It is, of course, axiomatic that the Courts are not bound by erroneous conclusions of law of administrative agencies. *National Labor Relations Board* v. *Brown,* 380 U. S. 278. The resolution of the TVA Board was simply a legal conclusion as to the meaning of the statutory prohibition against expansion of TVA service which conclusion was based on an erroneous interpretation of the Act. As such it was clearly sub-

ject to judicial review, and no novel question as to the scope of such review is presented here.

In seeking to place the construction of the TVA Act by its Board of Directors beyond the scope of judicial review, petitioners contend that the resolution of the Board was a "finding of fact" which was supported by "substantial evidence" and therefore not subject to review.

The Court of Appeals properly rejected this contention. In the first place the TVA Board is not a regulatory agency with quasi-legislative or quasi-judicial functions under the Act. Secondly, the facts upon which the determination of the Board were based were not in dispute. The precise location of the facilities and customers of KU and the TVA distributors in Claiborne County, on July 1, 1957, was known to all the parties and never in dispute. Similarly, the statistics as to the number of customers and amount of power and energy supplied by TVA distributors and KU in Claiborne County were not in question and were, in fact, stipulated in the trial of the case. To the extent that any "expertise" was required to determine where the customers and facilities of KU and TVA were located on July 1, 1957, such information has been fully developed in the discovery proceedings in the action and all parties are in agreement as to the location of the services of the respective utilities in Claiborne County.

It did develop during such discovery proceedings that TVA had, in fact, made no attempt to determine the exact location of the perimeter of its service area

in Claiborne County and the Board resolution was obviously prompted by this fact.[6]

The apparent purpose of the Board in adopting its resolution just before the trial was to enable TVA to argue the finality of such determination at the trial. The Board simply took the undisputed facts as to facilities and services of KU and the TVA distributors, as developed in the discovery proceedings in this case, and drew its own legal conclusion based on an erroneous interpretation of the Act and the Congressional intent embodied therein. It was the function of the District Court and the Court of Appeals to test the validity of the Board's interpretation of the law.

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[6]In the deposition of Mr. G. O. Wessenauer, TVA's manager of power, taken on August 12, 1964, two weeks before the adoption of the Board resolution, the following questions and answers were made:

"Q. Now, Mr. Wessenauer, a question has arisen in this case with respect to Claiborne County, and I would like to ask you how you would draw a line across that county depicting where the boundary of TVA service should stop under the terms of the Act?

A. I don't know the answer to that.

Q. Has any officer or representative of TVA given you any advice about that?

A. About what?

Q. About the drawing of the line, where it—what factors would govern the drawing of the line?

A. Well, I think the factors that would govern that would be provided for in the Act.

Q. And where would you draw it then, this Claiborne County, specifically?

A. I don't know; I haven't looked at it.

Q. Who would have the function in TVA of drawing that line?

A. Well, it would—if a line has to be drawn, it would be after an examination of all of the facts and I presume that we would get the advice of our Legal Department as to the meaning of the law with respect to any particular situation, and in light of that advice and the facts that we would have, we would ascertain where the line would be." (App. 261a-262a)

2. The Court of Appeals Properly Considered and Rejected the Interpretation Placed Upon the 1959 TVA Act by the TVA Board.

The petitioners contend that the Act contains no standards for determining the area for which TVA was the primary source of power supply and therefore it is necessarily incumbent upon TVA to make the initial determination as to its area of permitted service. Petitioners then contend that this initial determination by the Board was given no weight by the Court of Appeals.

The Act does contain the necessary standards for making the determination and the Court of Appeals, in fact, gave due consideration to each of the reasons given by the Board for its finding, and found them erroneous as a matter of law.

The "area" in which TVA was the "primary source of power supply" is the geographic area where TVA and its distributors were actually supplying power on July 1, 1957, as distinguished from those areas where other utilities were supplying power on the key date. That the location of customers and facilities is the controlling factor seems hardly open to question and, indeed, it was as much as admitted by TVA in this action.[7]

To this basic limitation there are four specific exceptions in the Act which are precisely defined, none of which are claimed to be applicable to this case.

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[7]TVA's manager of power, G. O. Wessenauer, testifying with respect to a map purporting to show the service area of TVA, stated that the boundary of the service area shown on the map was intended to be an approximation of the extent to which the lines of the TVA distributors went "*geographically.*" (App. 258a)

First, TVA service may be extended to such additional area not more than five miles around the periphery of the existing service area of TVA subject to the proviso, among others, that no part of such additional five miles may be in a municipality receiving electric service from another source on July 1, 1957 (*e.g.*, the Tazewells).

Second, TVA service may be supplied to customers in areas where TVA had generally established service, provided that such areas were not being served by another source on the effective date of the Act, August 6, 1959.

Third, TVA may serve certain specifically named cities and customers (not including the Tazewells) which are expressly excepted in the Act. Finally, TVA was permitted to make certain exchange power arrangements with other utilities.

Thus the area of permitted TVA service is set forth with precision in the Act. The Board simply failed to consider the tests and standards contained in the Act which expressly preclude TVA service to the area in question. The Court of Appeals properly refused to be bound by the Board's determination.

In adopting its resolution the TVA Board ignored the respective geographic service areas of KU and Powell Valley and based its determination on two other factors: (1) certain maps used in testimony before Congressional Committees considering various bills respecting TVA bond legislation; and (2) facts as to service by TVA distributors in the part of Claiborne County outside the area served by KU, which facts

showed that TVA distributors served "most" of the county.[8]

A reading of the opinion of the Court of Appeals shows that the Court duly considered each of these factors and properly rejected them as having no support in the language of the Act. First, the Court properly held that Congress should not be presumed to have intended all of Claiborne County, Tennessee, to be in the TVA area simply because TVA exhibited to Congressional Committees large-scale maps of the southeastern United States, which were admittedly rough approximations, showing all of Claiborne County in its area. Particularly is this true when other maps were submitted to the Congressional committees for the sole purpose of showing that KU was rendering service in Claiborne County.[9]

The other factor relied upon by the TVA Board, statistics as to service in Claiborne County as a whole, was also properly rejected by the Court of Appeals. These statistics showed that TVA distributors supplied approximately 2/3 of the customers and the power in Claiborne County, KU supplying the remaining 1/3. As noted by the Court of Appeals, the 1959 TVA Act as originally introduced in the House of Representatives[10] provided that TVA and its distributors could supply the whole of any county which was being partly supplied with TVA power on July 1, 1957. After extensive hear-

[8]App. 40b-47b.

[9]Such a map was in the possession of TVA but was specifically not brought to the attention of the Board (App. 225a-229a).

[10]H.R. 3460, 86th Cong. 1st Sess. (1959); see Appendix, *infra*, p. 1aa.

ings in which representatives of various utilities operating in the area adjacent to TVA strenuously objected to this "county-wide" approach,[11] the Act was amended to restrict TVA's power sales to the area where it was actually supplying power in 1957. The test as to service in the county as a whole was, therefore, necessary rejected by the Court as being clearly contrary to the legislative intent of the Act.

The Board, based upon the above factors, determined that the periphery of the TVA service area in Claiborne County, Tennessee, was the Kentucky-Tennessee border despite the undisputed fact that KU was the only supplier of power in the Cumberland Gap area *on both sides of the line* which the TVA Directors arbitrarily fixed as TVA's "periphery." The Court of Appeals properly considered and rejected each of the standards applied by TVA as being erroneous as a matter of law, and applied the only valid standard under the act, the geographic location of the customers and facilities of TVA on the given date.

In arguing that Congress intended to leave the determination of the TVA service area to its Board of Directors, considerable emphasis is placed by Petitioners upon the language of the Senate Report accompanying the Senate Committee version of the bill which ultimately became the 1959 TVA Act.[12] The emphasis placed on the Senate Committee Report is misleading in

[11]Hearings before the House Committee on Public Works, March 10-11, 1959, 86th Cong. 1st Sess. (#86-3, H.R. 3460).

[12]The Report is referred to in the Petition of TVA at pages 7 and 9, and in the Petition for the Cities at pages 11, 13, 14, 20, 21, 22, 24, 28.

the extreme. This Report accompanied a version of the bill which contained an area limitation provision which was rejected in its entirety, on the floor of the Senate, in favor of an amendment sponsored by Senators Talmadge and Randolph.[13] Senator Randolph had appended to the Senate Report his minority views opposing the Senate version of the bill.[14] Subsequently his own version of the bill was introduced on the floor of the Senate and was enacted.

The extent to which reliance by the Petitioners on the language of the Senate Committee Report is misleading can be readily seen from a brief review of the evolution of the language of the bill (H.R. 3460) which eventually became the 1959 TVA Act.

Basically, four versions of the area limitation provision of the bill were considered in the course of its passage through the two Houses of Congress: The version originally introduced in the House; the version as reported out of the House Committee and passed by the House (the so-called "Vinson" amendment); the version as reported out of the Senate Committee; and the version as amended on the floor of the Senate (the "Randolph" amendment) and finally passed by both Houses and enacted into law. For convenience the four versions of the bill are printed together as an Appendix to this Brief.

The bill as originally introduced in the House would have prohibited TVA service outside those counties

[13]105 Cong. Rec., p. 13048 (July 9, 1959).

[14]S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 53, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2018 (1959).

which lay wholly or partly within the Tennessee River drainage basin or those counties wholly or partly within the TVA "service area" as of July 1, 1957.

As noted previously (*supra,* page [11]), this "county-wide" approach was rejected by the House Committee on Public Works in favor of an amendment offered by Representative Vinson which would have prohibited the sale or delivery of TVA power "for use outside the service area of the Corporation [TVA] as it existed on July 1, 1957." The Committee adopted the amendment, adding a specific exception for certain named cities. The bill with the Vinson amendment was passed by the House and referred to the Senate Committee on Public Works where a second round of extensive hearings was held.[15]

A majority of the Senate Committee found the House Bill too restrictive on TVA and substituted language which would have permitted substantial expansion of TVA service. The Senate Committee version would have permitted TVA to expand its service area subject only to two general restrictions: first, TVA could not increase by more than the lesser of 2,000 square miles or 2½% the "area for which the Corporation was the primary source of power supply on July 1, 1957;" and, second, TVA could serve no new cities, wherever located, with a population in excess of 5,000 or 10,000 in the case of cities owning their own distribution system.

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[15]Hearings before a Subcommittee of the Senate Committee on Public Works, June 9-10, 1959, 86th Cong., 1st Sess., Revenue Bond Financing by TVA.

As set forth in its Report accompanying the bill,[16] the Senate Committee rejected the House version of the Bill because of what it felt to be problems in establishing a "rigid boundary for limitation of power service."[17] The language of the Senate Committee Report with respect to "elasticity and adjustment" and other quotations from the Senate Report set forth in the Petitions for Certiorari in this case[18] have reference to this Senate Committee version of the bill which would have granted to TVA broad discretion in the expansion of its service area, subject to the overall limitation of 2,000 square miles.

Senator Randolph filed his dissenting views to the Committee Report and subsequently caused to be introduced on the floor of the Senate an amendment which rewrote the entire area limitation provision. This amendment, with certain minor changes, was subsequently enacted into law. The Randolph amendment was a return to the strict House version of the Bill, with the previously discussed exceptions not applicable here, which restricted TVA service to the area it was serving on July 1, 1957.[19]

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[16]S. Rep. #470, 86th Cong., 1st Sess., July 2, 1959, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2000 (1959).

[17]Id., at page 8, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., at page 2007 (1959).

[18]Supra, note 12.

[19]The House version of the bill spoke of the "service area" of TVA whereas the Senate version (the Randolph amendment) speaks of the area for which TVA "was the primary source of power supply." That these terms refer to the same geographic area was made plain in the statement of Representative Vinson, the author of the House version, on the floor of the House just prior to final passage of the bill. Representative Vinson, speaking in favor of passage, stated:

"However, in providing an area limitation, the Senate, instead of using the definition of 'service area,' which seemed to

(Continued on following page.)

While it is true, as pointed out in the Petitions for Certiorari herein, that a majority of the Senate Committee favored "elasticity and adjustment" with respect to the expansion of the TVA service area and urged that the TVA Board be given considerable discretion as to the areas where it could expand its service, the views of the Committee did not prevail. The Act as finally passed prohibited the expansion of TVA service beyond the area it was serving in 1957, and the discretion of the TVA Board was replaced by certain precisely defined exceptions none of which are even argued to be applicable to this case.[20] The arguments of the petitioners based on the Senate Committee Report are in fact the very arguments rejected by Congress when it enacted the 1959 TVA Act.

(Continued from preceding page.)

be confusing to some, referred instead 'to the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.'

"The words 'primary source of power supply on July 1, 1957' have the same meaning as the language 'service area of the Corporation as it existed on July 1, 1957.' " 105 Cong. Rec., p. 14121 (July 23, 1959).

[20]In particular it should be noted that the statements contained in pages 21 and 24 of the Cities' Petition for Certiorari concerning the views of the Senate Committee are inaccurate and misleading. Senator Randolph is described as an "opponent" of the final language of the bill when in fact he was the *author* of such language. Again, at page 24 of this Petition there is a reference to the "final language" of the act being left to some degree imprecise because the Senate Committee believed it "desirable to authorize minor adjustments." As noted above, the imprecise language of the Senate Committee version of the bill was rejected in favor of the five-mile limitation and other precise exceptions not applicable here. Finally, it should be pointed out that the statement of Senator Cooper quoted at page 15 of the Petition of the Cities was a statement made in support of his unsuccessful motion to strike the Randolph amendment. As correctly pointed out by Senator Cooper, the effect of the Randolph amendment which was subsequently enacted was to deny TVA power to small communities near the periphery of TVA, such as Tazewell and New Tazewell, Tennessee. 105 Cong. Rec. 13052 (July 9, 1959).

CONCLUSION.

While the particular statutory provisions involved in this case have not been previously considered by this Court, the question presented with respect to the scope of judicial review of administrative actions is not a novel one. The Court of Appeals has held that a determination by the TVA Board as to the proper construction of a statutory limitation on its own powers is subject to judicial review. This holding is in harmony with well-settled principles of law as established by the applicable decisions of this Court.

It has been suggested by the petitioners that there there is considerable confusion and a prospect of mounting litigation under the 1959 TVA Act which would justify consideration of this case by this Court. This suggestion is not borne out by the facts. In the eight years since the enactment of the 1959 TVA Act this is the only case to have reached the United States Court of Appeals.[21] Should a conflict between or confusion among the decided cases under this Act arise in the future, review by this Court on writ of certiorari would

[21]There are three other cases in District Courts which involve the 1959 TVA Act: *Georgia Power Co.* v. *Tennessee Valley Authority*, Civil No. 1788, N. D. Ga.; *Kentucky Utilities Company* v. *Udall*, Civil No. 4835, W. D. Ky.; and *Jackson Purchase Rural Elec. Coop. Corp.* v. *Tennessee Valley Authority*, Civil No. 1275, W. D. Ky. The latter action was instituted in July of 1962 but to date no attempt has been made to set it for trial. A fourth case noted in the Petition of TVA, *Kentucky Utilities Co.* v. *Tennessee Valley Authority*, Civil No. 1158, W. D. Ky., was dismissed on April 12, 1962. Each of the above noted pending actions involves questions under the 1959 Act which are different from the questions presented in this case and a decision by this Court on the merits of the instant case would not be dispositive of the issues in the other pending cases.

be appropriate, but no such conflict or confusion exists today.

For the reasons set forth in this Brief, the Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Dated: March, 1967.

APPENDIX

APPENDIX

APPENDIX

H. R. 3460 as introduced in the House of Representatives on January 27, 1959:

> "It is hereby declared to be the intent of this Act that the power facilities built or acquired with the proceeds of such bonds or power revenues shall not be used, without prior approval by Act of Congress, for the sale or delivery of power by the Corporation outside the counties which lie in whole or in part within the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957, except, when economically feasible, to serve the United States or agencies thereof or to interconnect with other utility systems for exchange power arrangements, or to interconnect Tennessee Valley Authority generating plants, or to serve existing rural electric cooperatives (as same now exist as to area and as of July 1, 1957) now being served in part by the Tennessee Valley Authority: Provided, further, That except as expressly provided above, all contracts entered into after this provision becomes law for the supply of power to any distributor shall contain an agreement by said distributor to confine the resale of such power within the boundaries of the counties above described and such additional areas (not more than five miles from such boundaries) as may be necessary to care for the growth of communities within said counties provided said communities were receiving Tennessee Valley Authority power on July 1, 1957."

H. R. 3460 as reported out of the House Committee on Public Works with the Vinson amendment, April 14, 1959:

"Unless otherwise specifically authorized by Act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except when economically feasible for exchange power arrangements with other utility systems with which the Corporation had such arrangements on said date. Nothing herein contained shall prevent the Corporation from continuing service to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Chicamauga, Georgia; Ringgold, Georgia; and South Fulton, Tennessee; or agencies thereof: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as reported out of the Senate Committee on Public Works on July 2, 1959:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale of power (except with such States, counties, municipalities, corporations, partnerships, or individuals with which the Corporation had such contracts on July 1, 1957) which would make the Corporation a source of power supply for any city which owned its power distribution system on July 1, 1957, having a population in excess of ten thousand, or to any other city having a population in excess of five thousand, according to the latest Federal census, or which would in

any event, increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser, no part of which may be in a State not now served by the Corporation, nor more than five hundred square miles of which may be in any one State now served by the Corporation or its customers), the area for which the Corporation was the primary source of power supply on July 1, 1957; Provided, however, That in addition to the extension of the service area authorized in this subsection, nothing herein contained shall prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Chicamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association, and for the rural customers in the areas now served by the said East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as finally enacted with the Randolph amendment:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for

SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, and
JAMES B. DeBUSK, as Mayor of New Tazewell, Tennessee, - - - - - - Petitioners,

versus No. 40

KENTUCKY UTILITIES COMPANY, - Respondent.

POWELL VALLEY ELECTRIC COOPERATIVE, - - - - - - - - - - Petitioner,

versus No. 50

KENTUCKY UTILITIES COMPANY, - Respondent.

TENNESSEE VALLEY AUTHORITY, - Petitioner,

versus No. 51

KENTUCKY UTILITIES COMPANY, - Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS, EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, AND JAMES B. DeBUSK, AS MAYOR OF NEW TAZEWELL, TENNESSEE.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Nos. 40, 50 and 51

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, Et Al., - - - - - *Petitioners,*

v.

KENTUCKY UTILITIES COMPANY, - - *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS, HARDIN AND DeBUSK, MAYORS OF TAZEWELL AND NEW TAZEWELL, TENNESSEE.

OPINIONS BELOW.

The Opinion of the Court of Appeals is reported at 375 F. 2d 403 (6th Cir. 1966) (R. 718). The Opinion of the District Court is reported at 237 F. Supp. 502 (E. D. Tenn. N. D. 1964) (R. 302).

JURISDICTION.

The judgment of the Court of Appeals was entered November 15, 1966 (R. 747). No. 40 Petition was filed January 11, 1967 for the Mayors and the towns of Tazewell and New Tazewell; No. 50, February 13, 1967 for Powell Valley Electric Cooperative, hereinafter "PVEC"; No. 51 for TVA, February 13, 1967; and Certiorari was granted March 27, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTE INVOLVED.

The pertinent part of the statute involved here appears as Appendix A to this brief. This statute was the 1959 TVA Financing Act, 16 U. S. C. § 831n-4(a). The words of that Act chiefly under scrutiny here forbid TVA from making "contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

QUESTIONS PRESENTED.

1. Whether the TVA Financing Act destroys pre-existing rights of the public to choose its power supplier in an area where both a TVA distributor and an investor company were selling power on July 1, 1957.

2. Whether the TVA Financing Act gives Kentucky Utilities Company, hereinafter "KU", an ex-

clusive franchise guaranteeing freedom from competition from a TVA power distributor in an area where there was such competition on July 1, 1957.

3. Whether the TVA Board of Directors is obligated to make legal interpretations from time to time of the TVA Act and to make findings of fact based on those interpretations which, if supported by substantial evidence, have the binding effect of law.

STATEMENT.

This case arises out of a dispute between Kentucky Utilities Company on one side, the Towns of Tazewell and New Tazewell, Tennessee, Powell Valley Electric Cooperative and TVA on the other. The question is whether TVA power may legally be distributed by PVEC and the municipally owned electric systems to people within the Towns.

Prior to the advent of TVA, Dixie Power and Light Company, predecessor to KU, provided electric service to some locations in Claiborne County wherein the towns are located in northeast Tennessee (R. 330). KU held a non-exclusive county franchise giving it the right to occupy county roads along with other utilities (R. 341). It has never held a franchise from the towns. At a later date PVEC obtained a similar non-exclusive county franchise (R. 334, 335).

In 1954 Dixie Power and Light transferred its assets to KU and was dissolved (R. 329).

The problem of competition in the area over electric service was the result of substantial rate differentials between KU on the one hand and the city

systems of Tazewell and New Tazewell and PVEC (all TVA power distributors) on the other (R. 658).

Also there was evidence that the growth of PVEC service was the result of some failure of KU and its predecessor to be aggressive in providing service (R. 657, 658).

Mayor De Busk of New Tazewell stated:

> ". . . my parents and neighbors was trying to obtain electricity because we was—we didn't have no refrigerators, we didn't have no facilities, we even used a Delco plant, and so the Powell Valley was coming down in that area and my Dad had done give a deposit of $5.00 for the power and when KU got the word or heard that they were coming in that area they rushed right at once and took them up.
>
> . . . . . .
>
> "That shows that we wouldn't have grown if we hadn't had TVA power or Powell Valley power, and I think the records show that" (R. 675).

The rate differential resulted in construction of a large majority of new homes incorporating the principle of electric heat where those homes were built on lines of the city system or PVEC (R. 658).

Land values were greatly affected and such construction as was undertaken was largely confined to lots where TVA power was available. There, the interpretation KU placed on the territorial restriction provisions of the 1959 TVA Financing Act is partic-

ularly interesting as revealed in two interrogatories and answers.

KU was asked:

> "Q. 12. Do you contend that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the 'TVA area' as described in paragraph 10 of your complaint?
>
> A. Yes.
>
> Q. 13. If your answer to interrogatory 12 is in the affirmative, do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Elecric Cooperative, is within the 'TVA service area' as defined in your complaint?
>
> A. No" (R. 40).

The intense feeling of the people was indicated in a poll taken by the mayors which showed the people five to one or better in favor of receiving power from a TVA distributor rather than from KU (R. 672, 673). The manager of PVEC tells of his feeling that he is being forced to help the people, saying:

> "As manager of Powell Valley Electric Cooperative it would have been far easier for me to live with the territorial agreement with KU because I wouldn't have as many problems as I have probably if I lived with this agreement.
>
> Q. Did you feel that whichever way you went you were going to wind up in cour[illegible]

A. Yes, sir.

Q. What lead you to feel that way?

A. Well, from time to time people had in a roundabout way threatened to sue us, and as I said a while ago, our attorney said we might not be in too good a position in this situation.

Q. To refuse service to the public?

A. To refuse to serve these people" (R. 652).

In the midst of the turmoil there was a city election in which the main issue was power and in which the candidates supporting KU's position were defeated and the candidates favoring Powell Valley and the city systems were elected (R. 633).

Also in the struggle one tactic employed by KU was an effort to get cities to grant city franchises (R. 454 and 641). This it did by offering money to the cities. The representative of KU in delivering the checks was indefinite as to what the purpose of the checks was, but the checks had typed on them "in return for perpetual franchise" (R. 369). Paris T. Coffey, President of the Tazewell Chamber of Commerce testified:

"Q. And then I asked him, I said, would you give these checks to us without any strings being attached to them, and he—I don't remember exactly his reply about it. I said, we feel this is for a franchise, and he said, no, this is a dividend or something to that effect that we owe it to you, and I insisted, the fact about, Mr. Smith and I had kind of a strong argument over the check and I said, if we are due it, Mr. Smith, we are due it without strings. If we are not due it, I don't

think you can come over here and buy Tazewell for thirty some hundred dollars. That's the way I feel about it. We may be poor, but still we are independent from that angle.

And so, he left the checks, and, also I'll put it this way, Mr. Smith brought it down to a personal affair, he said, what about your funeral home out there, if somebody wanted to repair something about your funeral home. I said, Mr. Smith, if you will put your power down in competition with your competitor, as I have mine with my competitors, well, we will welcome KU power, and we do. We have nothing against KU, but we do want cheaper power" (R. 641).

Claiborne County, Tennessee, as a seriously depressed area in grave need of economic help (R. 639, *et seq.*; 683). Its condition of need caused many communications to pass between the representatives of the people in Tazewell and New Tazewell, largely through their mayors, in an effort to get KU either to lower the rate or to sell its facilities to the cities' system (R. 671, 685, 686). These efforts were unavailing. The last communication by letter from the mayors to KU went unanswered for a period of five weeks until finally the towns established, pursuant to the Tennessee law, municipal systems and commenced construction of their own distribution lines (R. 686).

The city system was established by resolution of the city councils in October of 1963. The cities employed a contractor to construct facilities to the points of service where service had been demanded. In only one case was there a physical cutover from KU service

to the city service without action on KU's part and this was done by Cecil Hurst, a motel owner. Hurst testified that he put in an application with the city and called KU to tell them to disconnect. After several fruitless attempts to communicate with KU he found the service manager of KU on the road.

> "I thought I'd get out and take after him and tell him, and went up the road about a mile and he turned around and I stopped and talked to him, and as soon as I started talking to him, he run off, and left me, and I had to run him down again and I ran him down in New Tazewell, and I blowed my horn, and he pulled over and stopped, and I told him I would like to discontinue Kentucky Utilities and he said, 'I'm not going to do it. I can't change. I can't take it loose' " (R. 635).

Hurst then tells about his going with the city contractor and obtaining a meter which he, jointly with the contractor, put on his motel physically changing the service from KU to the city service (R. 635, 636).

In other cases when KU was requested to terminate service it did so with its own crew, sometimes in a rather surprising manner. Jerry Brooks, owner of the Brooks Furniture Manufacturing Company of Tazewell, tells how he called KU and a KU man came out and cut power off in the middle of a working day when he had a full crew on without even giving him a chance to shut down his machinery and thus avoid a possibly dangerous situation. In response to a question of KU counsel as to whether the manner of the

cutoff was not reasonable from KU's viewpoint, Brooks comments:

> "The pole which carries the Kentucky Utilities service is not more than 50 feet to the entrance of my office, and since we had been buying power from KU these many years, I think Mr. Pressnell or someone from the utility company, should have at least shown me the courtesy of coming into my office and telling me they were going to cut the service. If they had I would not have objected to it, but I certainly would have gone out into my plant and turned off the motors and taken steps to prevent any damage to the machinery. Fortunately no damage was done" (R. 628, 629).

Shortly after the establishment of service from the system owned by the cities of Tazewell and New Tazewell, KU commenced this action.

One final and important point is necessary to a proper statement of facts herein. This is to recognize that on July 1, 1957 TVA distributors had lines completely surrounding the towns. They were supplying power at many points on all sides of the towns and in the area which the Circuit Court called KU's "corridor" (R. 561). This is graphically portrayed by Exhibit 91, whic his the only map precisely showing all users of TVA power in the area on that date. This map is attached to and made a part of the dissent of Circuit Judge Edwards in this case (R. 745, 552, Sheet 1b Ex. Vol. I). On July 1, 1957 KU was supplying 561 customers in the towns to 28 receiving TVA power. But in the total area of Claiborne County

TVA distributors supplied 3,564 customers to 1,839 for KU. The average KWH sales for June and July of 1957 were 1,015,000 to the TVA consumers compared to 610,000 for KU (R. 84). The foregoing is essential to determination of who was the primary source of power supply in that area on July 1, 1957.

SUMMARY OF ARGUMENT.

The statute herein interpreted forbids TVA from contracting for the sale of power in any manner that would make TVA or its distributors directly or indirectly a source of power supply outside *the area* for which the Corporation or its distributors were the primary source of power supply on July 1, 1967. The area of Claiborne County on that date had 3,564 users of TVA power compared to 1,839 users of KU power.

It is true the towns of Tazewell and New Tazewell on that date had 561 KU customers to 28 users of TVA service. But the towns were small dots in the general area and were ringed around by TVA lines and TVA customer outlets.

Petitioners Hardin and DeBusk and their towns of Tazewell and New Tazewell had been importuned for years to grant KU a franchise but had declined. KU entered a hot city election and was soundly defeated. Yet the Circuit Court holds that the area of the towns was outside an area for which TVA and its distributors were the primary source of power supply on July 1, 1957. This, in practical effect, removes TVA and its distributors from serving people it was serving prior to the cutoff date set up in the Act.

It is our first contention that there is nothing in the 1959 amendment of the TVA Act to warrant such a determination. It is our contention that what the Circuit Court does attempts to overrule the cases of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA,* 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), cert. den. 350 U. S. 884 (1955), in their holding that power companies have no legal right to be free from government competition. In so doing the Circuit Court strikes down the right of the people to decide on their own source of power supply. By eliminating one of only two possible sources of power supply, the Court has in effect granted exclusive and perpetual city franchises to KU.

It is our contention that in this area where both TVA power and investor company power was being distributed on July 1, 1957, the TVA Financing Act does not destroy the right of the power user to choose his source of supply. This, we submit, remains the prevailing law, unchanged by the statute here litigated. We believe the law gives first concern to the public; not to KU or TVA. We urge that in giving first concern to the public, our interpretation of the Act must prevail.

We also urge upon the Court the conclusion that administrative bodies such as the Board of Directors of TVA must of necessity make frequent interpretation of the acts under which they operate; that when such interpretation is made, it must be given deferential and

serious consideration in the courts. This was not done by the Circuit Court in the instant case.

We further submit that TVA, having made its interpretation of the law, marshalled substantial evidence upon which it based its finding. It found the area herein under consideration was within an area for which TVA was the primary source of power supply on July 1, 1957. We say that this finding is supported by the great weight of evidence—yet it only needed evidence enough so that if it were a jury matter, a court of law would not have been compelled to direct a verdict otherwise. *Consolo v. Federal Maritime Commission*, 383 U. S. 607 (1966).

Finally, we say that since the interpretation and finding of fact were made by TVA, it has submitted numerous reports of its activities to Congress and no question of this interpretation has been raised in Congress. Moreover, Congress has passed a subsequent amendment of the TVA Act in the interim, expanding TVA borrowing authority from $750,000,000 to $1,750,000,000. P. L. 89-537; 80 Stat. 346 (1966). The passage of this amendment by Congress without any question about the interpretation and determination here litigated, clearly implies congressional approval of the action taken by TVA.

ARGUMENT.

I.

The TVA Financing Act Does Not Destroy the Rights of the Public in an Area Where Both a TVA Distributor and an Investor Company Were Selling Power on July 1, 1957.

Perhaps the greatest error of the Circuit Court results from the fact that it treats this controversy as though the public had no interest here at all. The entire rationale of the opinion is as though this were simply a battle between KU on the one hand, TVA and PVEC on the other. Presumably on the date this act became law and on July 1, 1957, the magic date established within that law for making determinations about service areas, the public had some interest which might be consistent or inconsistent with the individual interests of those adversaries. "The public" would of course include public bodies, such as municipal corporations, and it would include the individual power users[1] as well as "the public" in the broad sense meaning everyone.

---

[1]An individual power user in an area served by more than one electric supplier usually has been held to have a right to choose his supplier. In *Otter Tail Power Company* v. *Sioux Valley Empire Electric Association*, S. D., 131 N. W. 2d 111 (1964), the court said: "... where two utilities are authorized by law to serve the same rural territory, consumers therein are free to choose and to change their supplier." 131 N. W. 2d at 117. See also *Smith* v. *Otter Tail Power Company*, S. D., 123 N. W. 2d 169 (1963); *Pitt & Greene Electric Membership Corp.* v. *Carolina Power & Light*, N. C., 136 S. E. 2d 124 (1964); *Blue Ridge Electric Membership Corp.* v. *Duke Power Company*, N. C., 128 S. E. 2d 405 (1962).

The fact that the financing act has not a single word to change the pre-existing interests of the public in the TVA area would clearly imply that those interests remain the same as prior to the act. The original TVA act contained numerous statements of concern for the public interest, which statements were not changed by the amendment. A typical statement is contained in the first part of Section 11 of the Act, 16 U. S. C. § 831(j), where it is stated:

> "It is hereby declared to be the policy of the government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the states, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to acquire a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity . . ."

The opinion of the Sixth Circuit, if implemented literally will have the effect of forcing TVA to cut off power to users whom it has been supplying for many years prior to the effective date of the act and prior to July 1, 1957. The Court first says:

"KU does not have an exclusive franchise, and accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area" 375 F. 2d at 415 (R. 735).

Then the Court continues to say:

". . . TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and therefore, it is no business of KU where these municipal systems obtain their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit" 375 F. 2d at 416 (R. 737).

The foregoing language completely blinks the fact that KU for a long period of time tried to obtain a franchise from the cities even to the point of offering money by checks marked "for perpetual franchise" while denying that was the purpose of the offer. If the Court's opinion is put into effect in its literal meaning, then TVA must get out of the Tazewells regardless of how long it has been there, because the

Tazewells constitute territory outside the area where TVA or its distributors were the primary source of power supply on July 1, 1957, and the act of Congress says that TVA may make no contract for the sale or delivery of power in such an area. Further language of the Court to this effect is as follows:

> "From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts 'for the sale or delivery of power.'" 375 F. 2d 412 (R. 729).

There is absolutely nothing in the act to permit of such construction, namely, that TVA was to be forced out of areas where its power was being sold prior to the enactment of the financing act, and prior to the cutoff date named in that act. The bill itself, of course, in its wording goes on to allow TVA to continue to serve in what is called "the area for which the corporation or its distributors were the primary source of power supply on July 1, 1957," and adds "and such additional areas extending not more than five miles around the periphery of such areas *as may be necessary to care for the growth of the corporation and its distributors within said areas;* . . ." (Emphasis added.)

With regard to what was intended by the Congress, it is stated in the Senate Report, which is the last of the Committee reports on the bill before passage:

> "In summation, the committee believes that H.R. 3460, as amended is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; prevent service to additional cities with a population in excess of 5,000 or 10,000 if they own their distribution systems; *protect the right of certain communities to choose their power supply;* protect the areas now being served by private utilities; preserve existing contracts, interchange arrangements, and power supply to defense installations; and reduce the possibility of litigation and confusion arising from ambiguous terms. It further believes that the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise." (Emphasis added.) *Revenue Bond Financing by TVA.* Senate Report No. 470, July 2, 1959 p. 9.

Senator John Sherman Cooper incorporated a statement in the Congressional Record which emphasized the point as follows:

> "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a

choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." 105 Cong. Rec. 13052.

Judge Taylor of the Federal District Court, Eastern District of Tennessee, recognized this in his opinion and states that the Senator "apparently had no question about its authority under the Amendment to serve municipalities inside the periphery." 237 F. Supp. 502, at 511 (R. 317).

In its failure to concern itself with the interests of the public, as that interest may be distinct from the interest of the power suppliers, we submit one substantial cause of the Circuit Court's error was that it misread the legislative history of the Act. The Court comments at some length on the Vinson Amendment which became a part of the bill as it passed the House, but was eliminated prior to final passage. The opinion states:

> "During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.
>
> "In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accommodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, between the Georgia Power Co. and TVA, and indeed in our own case between KU and PVA. See Hear-

> ings, Senate Committee on Public Works, 86th Cong., 1st Sess., S. 931 and H.R. 3460, pp. 39-51. 220 (1959). Rep. Vinson stated that his amendment 'writes into the law the "gentlemen's agreement." Hearings, House Committee on Public Works, 86th Cong., 1st Sess., H.R. 3460, p. 111 (1959).' " 375 F. 2d at 411; (R. 727, 728).

The Court then talks about the Senate version of H. R. 3460 which removed the language of the Vinson Amendment and replaced it with substantially different language prior to final passage. However, the Court incorrectly stated the language of the Vinson Amendment "ultimately became a part of the Act" and reasons from that position. The opinion further says:

> "In the Senate report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:
>
> " 'Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stabilization area should be defined and limited by law.*' U. S. Code Cong. and Adm. News, 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis Supplied.)
>
> "The 'others' were those who supported the Vinson Amendment which became a part of the bill." 375 F. 2d at 412 (R. 728, 729).

It is quite clear that Representative Vinson when he tacked on the Vinson Amendment was trying to help the Georgia Power Company in its efforts to restrict TVA. Representative Vinson stated his amendment would protect TVA consumers, but it was evident from his own statement that his real concern was for

> "the stockholders of the Georgia Power Company, the employees of the Georgia Power Company as well as thousands upon thousands of individuals who have investments in private utility companies." 86th Cong., 1st Sess., on H.R. 3460 and H.R. 3461, Report No. 86-3, p. 110 (1959).

The language Representative Vinson inserted in the bill when it was before the House was as follows:

> "Unless otherwise specifically authorized by act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except, when economically feasible for exchange-power arrangements with other utility systems with which the Corporation had such arrangements on said date." *Id.* at p. 111.

The language of the Act as passed is:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the*

Corporation or its distributors were the primary source of power supply on July 1, 1957. . . ." (Emphasis added.) 16 U. S. C. § 831n-4.

We suggest that the language of the Act as passed which restricts TVA, with exceptions, to the areas for which it or its distributors were the *primary* source of power supply on July 1, 1957, implies that in addition to the primary supplier of an area there might be some other supplier present in the same area as of that date. This language clearly implies that if there were more than one power supplier in an area, this would not be inside the main periphery of TVA unless TVA and its distributors were the *primary* source there on that date.

It is also noteworthy that the language speaks of power supply in "the area." It does not speak of "the municipality" as the Court has interpreted it in its opinion. This latter distinction is rendered more persuasive by the following language that in the area beyond the *primary* area, TVA was not to supply power "in a municipality receiving electric service from another source on or after July 1, 1957. . . ." So the Congress concerned itself only with "the area," except where TVA got out beyond the line where it was the primary source of power supply on June 1, 1957. Then it become concerned with something other than "the area." It became concerned with boundaries of municipalities. The words "the area" certainly imply something larger than the tiny bits of geography represented by the two small towns of Tazewell and New Tazewell.

In the final Committee Hearings, the report submitted by Senator Robert Kerr, Committee on Public Works, states:

> "The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power.
>
> . . . . . .
>
> "The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds by TVA." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, pp. 8, 9.

Individual views of the opponents of the final language of the bill, Senators Winston L. Prouty and Jennings Randolph, are contained in this same report.

Senator Prouty stated his apprehensions about the language as follows:

> "It is the committee's intent, insofar as the territorial restrictions in the bill are concerned, to permit desirable minor adjustments on the periphery of the area presently supplied by TVA power to take care of natural growth within that area.

> "However, I believe that in its efforts to protect the rights of present customers of TVA the committee has approved language which would permit a city or any other present customer of TVA to resell TVA power to innumerable communities, whatever their size, and throughout other areas, however large.
>
> "In my judgment, the language in the bill as presently written permits the Tennessee Valley Authority to make contracts for the sale of power with States, counties, municipalities, corporations, partnerships, and individuals with which it had contracts on July 1, 1957, and these contracts would not be subject to a territorial limitation of any kind." *Id.* at 52.

Senator Randolph also voiced fears about the language but went on to say:

> "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." *Id.* at 54

Thus we see two opponents of TVA interpreting the language of the Act entirely differently from the way it was interpreted by the Court of Appeals. This we should qualify to the extent that the Court of Appeals says KU service in the area does not constitute an island but is a peninsula. The question as to whether it was an island or a peninsula is best shown by the map, Exhibit 91, filed with Judge Edwards' dissent (R. 745, sheet 1b, Ex. Vol. I) which specifically locates every point of service of TVA

power in Claiborne County, Tennessee as of July 1, 1957.

The points of service in and around the towns as Exhibit 91 clearly shows are so numerous as to make it impossible to locate any corridor. Here also it is to be remembered not only does PVEC have a transmission line crossing the KU transmission line coming into Tazewell and New Tazewell but it also owns the substation from which all of KU's customers, all the customers of PVEC, and all customers of the city systems in the general area receive power (R. 459). The fact that KU owns a transmission line should be equated by PVEC's owning the substation from which all services is rendered in the area.

But the main point of importance, we think, is the fact of the myriad of service outlets of TVA power which existed as of July 1, 1957. The map also filed with the dissenting opinion (R. 746, 771) in the Circuit Court, exhibit No. 36, which purports to show a corridor of KU service does not show any specific points of service of KU and/or TVA distributors. Moreover, it was prepared in 1952, five years prior to the date picked by Congress as the cutoff date to determine the general boundaries of TVA's primary service area. We submit the Court should judicially note the fact that the five years from 1952 to 1957 were years of enormous growth in the electric industry generally and in the Tennessee Valley, particularly. Therefore the map KU offered to show it served a corridor lacks relevance in that it is not tied to the magic date of the TVA Financing Act itself.

In most of the big power battles that have reached the Supreme Court, this Court has sought to interpret the law from the interest of the public as a whole. In the case of *United States Ex. Rel. T.V.A.* v. *Powelson,* 319 U. S. 266 (1943) this Court addressed itself to the question of the valuation of property owned by a private power company, later assigned to an individual, which was under condemnation by TVA. This property constituted an appropriate site for the production of hydroelectric power. The condemnee was seeking to assert that the profits attributable to its anticipated production of hydro power should be considered as evidence of the value of the land taken. The Court said:

> "The law of eminent domain is fashioned out of conflict between the people's interest in public projects and the principal of indemnity to the landowner." 319 U. S. at 280.

In a footnote on the same page, the Court approves a quote from a state case, *Wissler* v. *Yadkin River Power Co.,* 158 N. C. 465, 74 S. E. 460 (1912), where the Supreme Court of North Carolina said:

> "This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large."

So has it always been with public service corporations endowed with the power of eminent domain. The theory behind this mighty power is that these corpora-

tions' first concern must be the public interest, rather than investor-stockholder interest.

The *Powelson* case has been followed in a number of other cases, two of which are *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949), and *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956). The latter case was another case where the United States was condemning land adjoining the Savannah River owned by investor power companies which had acquired it for the development of hydro power. The Court, citing the *Powelson* case, rejected the companies' suggestion that the property taken be valued by its prospective use for hydro electric power purposes, saying:

> "To require the United States to pay for this water-power value would be to create private claims in the public domain." 350 U. S. at 228.

A further sampling of the very broad general legal principal that public service corporations must concern themselves with the public interest and that cities constitute part of that interest, is shown in the case of *Richmond* v. *Southern Bell Telephone and Telegraph Co.*, 174 U. S. 761 (1899). Here the Telephone Company was seeking assistance of an act of Congress of 1866 which it claimed gave it a right to occupy the streets of the city of Richmond against the will of the local authorities of that city. The act did give telegraph companies the right to use post roads. The Court denied the telephone company's contention and held the act was not intended to confer upon the com-

pany any special rights in the streets of the city, saying:

> ". . . questions that will occur to everyone indicate the confusion that may arise if the act of Congress relating only to telegraph companies be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies . . . But we are unwilling to rest the construction of an important act of Congress upon implication merely, particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions." 174 U. S. at 777.

That case also has been followed in a number of cases, including the case of *Western Union Telegraph* v. *Richmond,* 224 U. S. 160 (1912) where the Court at page 169 says:

> "The inability of the state to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on all commerce among the states, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners, or as against the city or state, where it owns the land."

Though these are not recent decisions it seems to us that the same principle applies in the case at bar, namely: That where KU has sought and failed to obtain a franchise from the cities of Tazewell and New

Tazewell, it is wrong to interpret the TVA financing act as giving them the franchise which the people and the towns refused. To say KU is the only legal supplier of power within the towns, we submit, is in practical effect to grant just such a franchise.

Concluding this point of how the Supreme Court and courts generally have considered the business of electric power supply in relation to the interest of the public as a whole, we wish to cite two more cases which we submit are appropriate for consideration. The first is the recent "High Mountain Sheep" decision of this Court, *Udall, et al.* v. *FPC, et al.*, 385 U. S. 926 (1967). In this case, as this Court recalls, the question was whether or not the Federal Power Commission had given adequate consideration to the public interest in granting Pacific Northwest Power Company a license to construct a hydroelectric power project at High Mountain Sheep on the Snake River. The Court remanded the matter to the Commission for further consideration, holding that it had failed adequately to concern itself with certain matters of interest to the public as a whole, saying:

> "The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest." 385 U. S. at ——.

The other case was decided by the Court of Appeals for the Second Circuit, *Scenic Hudson Preservation*

Conference v. *FPC,* 354 F. 2d 608 (2nd Cir. 1965) cert. den. 384 U. S. 941 (1966). In this case FPC granted a license to construct a pump storage hydro-electric project to Consolidated Edison Company. The project was to be located on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. The Second Circuit remanded the matter to the Commission, saying that the Commission had not given adequate consideration to the interest of the public as a whole. The Court aptly comments:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." 354 F. 2d at 620.

In the case at bar the cities feel strongly that the real error of the Sixth Circuit here was that it saw itself acting "as an umpire blandly calling balls and strikes for" the adversary power suppliers, forgetting that "the right of the public must receive active and affirmative protection." The District Court appropriately gave concern for that right. The Circuit Court did not.

II.

The TVA Financing Act Gives KU No Right To Be Free of Competition From TVA Power Distributors in Areas Where There Was Such Competition on July 1, 1957.

As has been mentioned, the Circuit Court seeks to emphasize that KU does not claim protection from "all competition." And yet the judgment of the Court terminates one of only two sources which have offered power supply to the area for a period of many years. These two sources are also, as a practical matter, the only two possible sources of wholesale power supply available for distribution in the area. Thus, the effect of the Court's decision gives KU an exclusive monopoly franchise which it has sought and been unable to obtain from the people. The Tennessee statutes specifically give the towns the right to acquire their own electric systems and to supply power to their citizens in competition with KU. Tenn. Code Ann. §§ 6-1501 to 1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to 1318 (1955) (Revenue Bond Law.) This authority has been sustained in the courts in the cases of *Keeble* v. *Loudon Utilities,* Tenn., 370 S. W. 2d 531 (1963); *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22 (1906); *West Tennessee Power & Light* v. *City of Jackson,* 97 F. 2d 979 (6th Cir. 1938).

The effect of the Court's decision is to kill the cities' systems as distributors and to hold that the TVA Financing Act overrides the acts of the Tennessee legislature and withdraws the rights which the

Tennessee law purports to afford. This is certainly a broad departure from the development of law up to this point, for the right to TVA to afford competition to the investor companies has hitherto been well established in the following cases cited in the Opinion of the 6th Circuit, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA,* 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), cert. den. 350 U. S. 884 (1955).

Very recent sanction for the philosophy contained in the above cases is to be found in *REA* v. *Central Louisiana Electric Co. Inc.,* 354 F. 2d 859 (5th Cir. 1966) cert. den. 385 U. S. 815 (1966). In this case three power companies had obtained a district court injunction to stop a loan by REA to an electric cooperative. The Circuit Court in reversing the District Court held the power companies could not challenge the loan and, citing the cases above cited, the Court commented:

> "Appellees here are not parties to the loan. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law. They are not having any penalty or forfeiture directly assessed against them. They come into court to halt a loan to a third party, contending that the loan is being illegally made and, in the future, will cause illegal consequences. Their only standing for this is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right." 354 F. 2d at 865.

A still later case is *Northern States Power Co.* v. *REA,* 373 F. 2d 686 (8th Cir. 1967) cert. den. 387 U. S. 945 (1967). Here the Eighth Circuit Court likewise dissolved an injunction against the Rural Electrification Administration, which injunction had been obtained by power companies to stop an REA loan. Citing the same three cases, the Court said:

> ". . . the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans. . . . Nor did passage of the Administrative Procedure Act create legal rights which otherwise did not exist." 373 F. 2d at 692.

In this case the power companies claimed special standing to sue, citing our case at bar which had then just been decided by the 6th Circuit. The 8th Circuit rejected the contention, again citing *Tennessee Power Co.* v. *TVA,* 306 U. S. 118 (1939).

In the *Northern States* case the power companies argued that the Administrator of REA had failed to perform a duty owed them pursuant to certain regulations which the Administrator had promulgated. The Court in rejecting the contention commented:

> "If anyone is the beneficiary of the regulation, it is the rural consumer of cheap but efficient electrical energy. The intent of the regulation is to assure the borrower, not the power supplier, 'the most advantageous power supply arrangement.'

". . . In administrating the REA program 'freedom from competition' is not a legitimate end of the legislation or regulations promulgated thereunder." 373 F. 2d at 696.

Thus, we submit, have the courts sustained the principle that private power companies have no inherent right to be free of government competition. And in areas where both TVA distributed power and investor-company power was being sold on July 1, 1957, Congress has not changed that principle by enactment of the statute herein litigated.

III.

The TVA Board Has an Obligation to Make Legal Interpretations of the TVA Act, and to Make Findings of Fact Based Upon Those Interpretations Which, if Supported by Substantial Evidence, Have the Binding Effect of Law.

Administrative agencies of necessity must daily make interpretations of the basic law under which such agencies operate. In *Securities and Exchange Commission* v. *New England Electric System,* 384 U. S. 176 (1966) the Court concerned itself with an interpretation made by the Securities and Exchange Commission of a portion of the Public Utility Holding Company Act. The interpretation made by the Commission had been upset by the Court of Appeals, but this Court reversed, saying:

"This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company

in a holding company system may make more for investors than a gas company converted into an independent regime." 384 U. S. at 185.

Similarly, this Court in the case of *Federal Trade Commission* v. *Borden Co.*, 383 U. S. 637 (1966) was concerned with an interpretation made by the Federal Trade Commission of Section 2 of the Clayton Act. The Court of Appeals for the Fifth Circuit set aside the order of the Commission because it disagreed with the Commission's interpretation of the words of "like grade and quality." This Court reversed in a clear-cut holding that the Commission's interpretation of the Act was the proper one, saying the "views of the agency are entitled to respect . . . and represent a more reasonable construction of the statute than that offered by the Court of Appeals." 383 U. S. at 640.

Other recent cases where this Court has given great weight to the interpretation placed on an act by those responsible to administer it are: *Atlantic Refining Company* v. *Federal Trade Commission*, 381 U. S. 357 (1965) where the Federal Trade Commission interpreted the Federal Trade Commission Act; *Zemel* v. *Rusk*, 381 U. S. 1 (1965) where the Secretary of State interpreted the Passport Act of 1926 and the Immigration and Nationality Act of 1952; *Federal Power Commission* v. *Union Electric Company*, 381 U. S. 90 (1965) where the FPC interpreted § 23(b) of the Federal Power Act; *Udall* v. *Tallman*, 380 U. S. 1 (1965) where the Secretary of Interior interpreted a presidential executive order; and *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964) where

the Maritime Commission interpreted the Merchant Ship Sales Act of 1946.

Despite the reasonable principle of law according respect to the expertise of administrative agencies interpreting the acts under which they operate, the opinion of the Court of Appeals in the case at bar flatly questions whether the Board of Directors of TVA has any responsibility to make such a determination as was made by the Board here.

The Court said:

> ". . . TVA argues, the 1959 Act must be read as committing to its board of directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's board such authority." 375 F. 2d at 412 (R. 729).

It was stated many times by the Committee that the final language of the Act was left to some degree imprecise respecting the area within which TVA's power might be distributed. This was deliberate, as the Committee said, because it believed it "desirable to authorize minor adjustments." This being so it is extremely difficult to rationalize, as the majority of the 6th Circuit does, to the point of the above quoted language.

The authority of the TVA Board to make by-laws, regulations, findings and determinations in the administration of its affairs under the Act has always been sustained. One of the early cases on the point was *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990

(6th Cir. 1940) cert. den. 312 U. S. 701 (1941). This case was a determination of the power of the President to remove a director from the TVA board, the President having dismissed Arthur E. Morgan. Morgan contended that the President had no such right to remove a member of the board during the term for which he was appointed. The Court explained the position of the TVA Board as follows:

> "Many of these activities, prior to the setting up of the T.V.A. have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obligated to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in nowise, different, except perhaps in degree, from the duties of any other administrative officers or agencies or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidential to the carrying out of a great administrative project. The board does not sit in judgment upon private controversies, between private citizens and the government, and there is no judicial review of its decisions except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department." 115 F. 2d at 994.

This has essentially described the position of the TVA Board for more than a quarter of a century. But one other very important point here to be considered is the fact that TVA does have a responsibility under the Act to make annual reports to Congress. After these reports are made it is appropriate for Congress in maintaining its surveillance over the entire operation to question any administrative decisions it thinks proper. It is noteworthy that in August of 1966 the 89th Congress substantially amended the TVA Act. This amending act extends the borrowing authority of TVA from $750,000,000 to $1,750,000,000. Neither in the reports made by TVA to the Congress nor in Congress's 1966 amendment of the TVA Act has any question been raised about the administrative determination herein held invalid by the 6th Circuit. Had Congress felt TVA had committed substantial violation of the 1959 amendment, surely it would have raised questions.

In the case of *TVA* v. *Kinzer,* 142 F. 2d 833 (6th Cir. 1944), the Court ruled upon a determination made by TVA's Board relative to the establishment of a retirement system for its employees. The Court said:

> ". . . the issues are: whether § 3 required regulations; whether the rules and regulations here in question are reasonably adapted to the administration of the act; and whether such regulations have received the legislative ratification that gives them the effect of law. If these propositions are answered affirmatively, the appellant must prevail." 142 F. 2d at 835.

The Court in the *Kinzer* case held that affirmative answers must be given to the questions and it said that continuing appropriations by Congress manifested congressional approval of administrative determinations made up to the time of the appropriation. The holding in the *Kinzer* case, we submit, is most important for the light it throws on the instant case. The Court there said:

> "The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the reenactment of a statute, the provision of which had, theretofore, been interpreted by regulations: they are deemed to have received Legislative ratification and thereby, to have become embedded in the law; and are to be given the same force and effect as the statute itself." 142 F. 2d 837.

The Supreme Court in the previously cited case of *Zemel* v. *Rusk*, 381 U. S. 1 (1965) held that subsequent legislation on a subject, which does not change previous administrative interpretations, provides support for the correctness of those interpretations.

In our case, applying the rule of the *Kinzer* and *Rusk* cases, we note that TVA made five separate annual reports to the Congress since the administrative determination was made by the TVA Board on February 4, 1960 and prior to the adjudication of this case in the Court of Appeals. Also in this period of time Congress has amended the TVA Act to authorize

TVA to raise a billion additional dollars. Clearly these factors establish Congress' tactit approval of the Board's administrative action in the meantime and thus that action by way of its interpretation on territory has become "embedded in the law" and is to be given the same force and effect as the statute itself.

The TVA Act gives the Board power to "adopt, amend and repeal by-laws" and to exercise "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation." 16 U. S. C. § 831(c). The Senate Committee clearly recognized this power and in putting together the final language of the 1959 amendment to the Act, that Committee commented:

> "The committee believes that the TVA Board would not be reckless in utilizing the authority to provide additional service, which actually amounts to less than 1 mile around the periphery of the present area in which TVA power is used, and would properly use such authority to supply isolated communities and contiguous areas, extension into rural areas and expanded municipal areas, and minor necessary adjustments around the periphery and within the area in which power is now supplied.
>
> "H. R. 3460, with the amendments proposed by the committee, does not change the basic administrative premise of the TVA Act. The TVA Board will continue to be held fully responsible by the Congress for the results of its operations, and it will have corresponding administrative authority in the discharge of this responsibility. The ac-

tions of the Board will be subject to annual review by the Congress." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, p. 7.

Extending then upon the thought that administrative agencies are of necessity put to the task of making almost daily interpretations of their own statutes, we submit that Congress has, in accepting annual reports of TVA and in passing a subsequent amendment to the TVA Act, implicitly approved the determination herein made by the TVA Board.

This brings us to the fact finding obligation of TVA. The TVA Board did interpret its own law and it marshalled a number of facts before making the finding objected to by KU. One of the important facts was a map of Claiborne County, Tennessee, which appears in the record as Exhibit 91 (R. 745, Sheet 1b, Ex. Vol. I). This map is the only map which shows the customers and lines of distributors of TVA power as of July 1, 1957. It shows that the towns were ringed around by purchasers of TVA power.

It was also a fact considered by the Board that there were numerous points of TVA power supply inside the towns on that date, although as has been stated, there were not nearly so many TVA customers in the towns on July 1, 1957 as there were KU customers, the comparison being 561 of KU to 28 of TVA. The fact that there were only 589 customers in all does give some idea of what small dots on the map the towns actually are. This we urge should be considered in relation to the words of the Act saying that the test is

a test of the "area" for which TVA and its distributors were the primary source of power supply. Based upon its interpretation of what "area" meant, the Board found that all of Claiborne County was within TVA's primary service area.

It has been repeatedly held that findings of fact of administrative agencies supported by "substantial evidence" must be sustained. In the case of *United States* v. *Utah Construction & Mining Co.;* 384 U. S. 394 (1966) the court was concerned with a dispute between a construction company and the Atomic Energy Commission. The dispute had been adjudicated by the Advisory Board of Contract Appeals. The Board's decision was appealed to the Court of Claims which proceeded to adjudicate, *de novo*, certain issues. On certiorari to the Supreme Court the Court of Claims was reversed because of its failure to give finality to the factual findings of the Board. The court said there was neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties. The situation was admittedly a different one from the case at bar but it does bear some reasonable analogy.

Furthermore, in the case of *Consolo v. Federal Maritime Commission,* 383 U. S. 607 (1966) the Supreme Court considered on certiorari a decision of the District of Columbia Circuit. The Circuit Court had upset a finding by the Federal Maritime Commission. This Court held that an improper standard of review was used when the Court of Appeals adjudicated the matter on a basis of determination that sub-

stantial evidence supported a conclusion contrary to that reached by the Commission. This Court held such a standard not consistent with that provided by the administrative procedure act. The Supreme Court, approving a previous definition, said substantial evidence was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." The court further said: "this is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." 383 U. S. at 619, 620.

In a yet more recent case, *Illinois Central Railroad Co.* v. *Norfolk & Western Railroad Co.* —— U. S. —— 17 L. Ed. 2d 162 (1966), this court again has so defined "substantial evidence." There action by the Interstate Commerce Commission had been overturned by a three judge United States District Court. On direct appeal the Supreme Court reversed, saying that substantial evidence was enough evidence to justify a refusal to direct a verdict.

The Court of Appeals in its opinion is unable to state definitely whether the judgment of the District Court was an independent finding of fact or is simply an order sustaining the resolution of the TVA Board. The Court of Appeals says:

> "The District Judge arrived at his decision primarily upon acceptance as having been made

in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to finding of fact, we consider that it was clearly erroneous." 375 F. 2d at 412 (R. 729).

It also states:

> "We do not consider that the District Judge's recitation that:
>
> > "'KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Taxewell.'
>
> was a finding of fact that the Tazewells were 'islands.'" *Id.* at 413 (R. 732).

If the Circuit Court is correct in its inference that the handling of the case by the District Court amounted to an affirmation of the finding by the TVA Board, then that finding is entitled to stronger presumption of support than if it were merely a finding of fact by the District Judge. FRCP 52(a) says in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Under this rule perhaps the leading case is the case of *United States* v. *United States Gypsum Company,* 333 U. S. 364 (1948). Mr. Justice Reed, speaking for the Court in this case gives the reason for the rule and extent of its applicability as follows:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by adminisrative agencies* or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.) 333 U. S. at 394, 395.

In the italicized portion of the above quote the Court by footnote cites the case of *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945). In the *Corn Products* case the Court

sustains a finding of the Federal Trade Commission, saying :

> "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." 324 U. S. at 739.

Thus we submit that if the 6th Circuit can by a simple statement, in face of undenied facts and documents, overturn a District Court which in turn sustained the finding of an administrative body, this then virtually destroys any rule or presumption of correctness of the original finding. It leaves the question as wide open to redetermination as if no administrative determination at all had been made in the first instance.

We strongly urge upon the Court that it would be impossible to administer TVA without the TVA Board making certain findings which in some instances requires an initial interpretation of the TVA Act. We further submit that where those findings are based upon substantial evidence they must be sustained by the District Court as the District Judge here stated in his opinion. Finally, since the 6th Circuit felt the discussion eminated originally and was bottomed upon the administrative determination, that determination is entitled to a greater presumption of correctness than had it been a completely independent finding *de novo* by the District Court.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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October, 1967.

APPENDIX

APPENDIX

APPENDIX A

PERTINENT SUB-SECTION OF TVA 1959 FINANCING ACT.

(As Amended by PL 89-537—1966)
16 U.S.C. § 831n-4

Bonds For Financing Power Program—Authorization; Amount; Use of Proceeds; Restriction on Contracts For Sale or Delivery of Power; Exchange Power Arrangements; Payment of Principal and Interest; Bond Contracts.

(a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $1,750,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of

power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area; Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton Tennessee; or agencies thereof; or

from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is

authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.

SUPREME COURT, U. S.

OCT 7 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 50

POWELL VALLEY ELECTRIC COOPERATIVE,
Petitioner,

vs.

KENTUCKY UTILITIES COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR POWELL VALLEY ELECTRIC COOPERATIVE

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OPINIONS BELOW

The majority and dissenting opinions in the court of appeals are reported at 375 F.2d 403. The opinion of the district court is reported at 237 F. Supp. 502.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1966. The petition of the Powell Valley Electric Cooperative for a writ of certiorari was filed

on February 13, 1967, and was granted on March 27, 1967 (386 U.S. 980; R. 749). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does section 15d(a) of the Tennessee Valley Authority Act (16 U.S.C. § 831n-4(a)) insulate a private utility from the competition of two small municipalities using TVA power supplied to them by a rural electric cooperative which on July 1, 1957, had lines completely surrounding and penetrating into the towns and supplied TVA power on all sides of the towns and within the towns themselves?

2. Where the TVA Board of Directors has construed section 15d(a) of the TVA Act as not prohibiting the sale of TVA generated power in competition with private utilities within such towns, does such construction represent a reasonable exercise of the Board's executive responsibilities which is not subject to judicial reversal?

3. Where the TVA Board has determined that two small towns are inside the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and such determination was made in good faith and supported by substantial evidence, may such determination be overturned by the courts?

STATUTE INVOLVED

The principal statutory provision involved is section 15d(a) of the TVA Act, which is printed in the appendix to the brief for the Tennessee Valley Authority.

STATEMENT AND ARGUMENT

Petitioner adopts the STATEMENT and ARGUMENT set forth in the briefs of petitioners *Hardin, Mayor of Tazewell, et al. v. Kentucky Utilities Co.*, No. 40, and *Tennessee Valley Authority v. Kentucky Utilities Co.*, No. 51.

Respectfully submitted,

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Jonesville, Virginia,

Attorney for Petitioner.

October 3, 1967.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 51

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

KENTUCKY UTILITIES COMPANY [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals are reported at 375 F. 2d 403. The opinion of the district court is reported at 237 F. Supp. 502.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1966. The petition of the Tennessee Valley Authority for a writ of certiorari was filed on February 13, 1967, and was granted on March 27, 1967 (386 U.S. 980; R. 750). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] Together with No. 40 (*Hardin, Mayor of Tazewell, et al.* v. *Kentucky Utilities Co.*) and No. 50 (*Powell Valley Electric Cooperative* v. *Kentucky Utilities Co.*).

QUESTIONS PRESENTED

A private utility was the principal supplier of electric service within the corporate limits of Tazewell and New Tazewell, two small municipalities in Claiborne County, Tennessee, but distributors of TVA power supplied two-thirds of the electric service within the county, and the lines and service of one of them surrounded and penetrated the two towns. In these circumstances, the Board of Directors of the Tennessee Valley Authority determined that the towns were within "the area for which the Corporation [TVA] or its distributors were the primary source of power supply on July 1, 1957," within the meaning of Section 15d of the TVA Act, which permits TVA power to be made available without restriction within the primary area. The following questions are presented:

1. Whether the private utility company had standing to sue to enjoin the distribution of TVA electricity by the towns in competition with the company.

2. Whether the court of appeals erred in ruling that the Board's determination was entitled to no deference and that the courts are to determine *de novo* the boundaries of TVA's primary area.

3. Whether the Board's determination in this case should have been sustained.

STATUTE INVOLVED

The provisions of Sections 10, 11, 12 (48 Stat. 64, as amended, 16 U.S.C. 831i, 831j, 831k) and 15d(a) (73 Stat. 280, as amended 16 U.S.C. 831n-4 (a)) of the Tennessee Valley Authority Act are printed in the Appendix, *infra*, pp. 39-46.

STATEMENT

Tazewell and New Tazewell are two small incorporated towns in Claiborne County, Tennessee (R. 332). They lie a few miles southeast of the point where Kentucky, Virginia and Tennessee come together and between the forks of the reservoir created by TVA's Norris Dam. Since the 1920's, respondent Kentucky Utilities Company (or its predecessors) has maintained a power line extending some 16 miles from the Kentucky border to the Tazewells (R. 328-29; Ex. 38, R. 410, 773). The line provides electric service in these towns and in other small Tennessee communities along the highway between Middlesboro, Kentucky and Tazewell (R. 407, 409). Respondent also has a power line running into a small area in the western part of the county (Mingo Hollow) (R. 575; Ex. 38, R. 410, 773). But it has never extended its service into the less populous areas of Claiborne County (R. 640, 651). Service to most of Claiborne County is provided by two distributors of TVA power—Powell Valley Electric Cooperative ("Powell"), with headquarters at Jonesville, Virginia; and the City of LaFollette, Tennessee ("LaFollette"), located in Campbell County, which adjoins Claiborne County on the west. Powell began to extend electric service to residents of Claiborne County some time prior to 1941, and by 1957 its lines blanketed the eastern half of the county, encircling Tazewell and New Tazewell and extending into both towns (R. 561; Ex. 105, Ex. Vol. I, sheet 2b, R. 649-51). Meanwhile, LaFollette had extended its lines to cover the western half of the county, with the exception of

the uninhabited mountainous areas.[2] By July 1, 1957, the two TVA distributors provided approximately two-thirds of the electric service in the county, whether measured in number of customers, kilowatt-hour sales, or depreciated plant investment (R. 84-85, 441-442).

Powell's rates were much lower than respondent's for any substantial use of electricity. For an electrically heated home, respondent's rates were 2½ times as high as the Powell rates.[3] As a result, property served by Powell had a much higher market value (R. 645). Almost none of the newer homes were built on property that did not have Powell service available,[4] and such property was also unattractive to industry (R. 187, 683). This situation was felt to be retard-

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[2] TVA Exhibit No. 91 (Ex. Vol. I, sheet 1b, R. 552) shows Tazewell, New Tazewell, and the lines and customers of TVA power distributors in Claiborne County as of July 1, 1957 (the operative date for determining the primary area of TVA service). The lines covering the eastern part of the county and completely surrounding the Tazewells are Powell's. Those covering the western portion (except for mountainous areas which are without electric service) are LaFollette's (R. 561). KU Exhibit No. 38 (R. 410, 773) is a copy of TVA Exhibit No. 91 on which respondent has drawn its own service lines. KU Exhibit No. 25 (R. 385-86, 758) is a map of Tazewell and New Tazewell showing the respective service of respondent, and Powell on July 1, 1957, and KU Exhibit No. 24 (Ex. Vol. I, sheet 3b, R. 384) provides similar information as of April 24, 1964.

[3] Comparative rates were as follows (R. 657-58):

KWH	KU	Powell
3800	$75.53	$30.50
4800	$95.53	$38.00

[4] The Mayor of New Tazewell testified that the only modern home he knew of in the area supplied by respondent in New Tazewell had been built by an employee of respondent, while a number of modern homes had been built on land where TVA power was available. Lots with TVA power available sold for about a third more than otherwise identical lots dependent on respondent's power (R. 671-72).

ing the growth of the towns (R. 187, 639, 683), and gave rise to considerable discontent (R. 187, 651-652, 668). The towns decided to seek TVA power, to which they thought they had a special claim because of their proximity to Norris Dam (R. 638, 671).

On February 4, 1960, representatives of the Tazewells and of Middlesboro, Kentucky met with the TVA Board of Directors to inquire whether they could obtain TVA power. They were told that the Tazewells were within the area in which TVA power could be supplied but that Middlesboro, which lies just north of the Kentucky-Tennessee line, was not (R. 311, 576-577; Ex. 98, R. 577-578, 811-812).[5] The Board suggested that, because of their small size, the Tazewells should explore the possibility of obtaining TVA power through Powell (Ex. 98, R. 577-578, 811-812). The towns undertook to make the necessary arrangements. Finally, in the words of the district court:

> [T]he two towns, through their authorized officials, circulated a petition to the citizens of the towns to determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the towns of their own municipal electric systems. Following the circulation of these petitions, the town councils passed resolutions on October 21, 1963 authorizing the Mayors of the two towns to take the necessary steps to purchase or

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[5] Subsequently, on August 26, 1964, the TVA Board, in response to inquiries from various sources as to the availability of TVA power in other parts of Claiborne County, made a formal determination that all of Claiborne County (including the Tazewells) is within TVA's primary area (Ex. 93, R. 552-553, 795-809).

> build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing of the customers in the name of the two towns. [R. 311-312.]

In October 1963 some residents of the towns who had been receiving electric service from respondent began to receive service from the towns instead, and on November 7, 1963, respondent instituted the present action (R. 2, 312).

The complaint (R. 6-13) alleged that Tazewell and New Tazewell were not within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and that service within the towns to customers not already receiving TVA power was, therefore, in violation of Section 15d of the TVA Act (Appendix, *infra,* pp. 43-46). Federal jurisdiction was predicated upon Section 15d of the TVA Act and the existence of a federal question (28 U.S.C. 1331), and injunctive relief was sought. After trial, the district court dismissed the complaint. While upholding the standing of respondent to sue, it concluded:

> The finding of the Board was made in good faith and supported by substantial evidence.

> The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. [R. 321.]

The court of appeals reversed, Judge Edwards dissenting. It held that the TVA Board is without authority to determine the area for which TVA or its distributors were the primary source of power supply on July 1, 1957 (R. 729). Correlatively, the court held that the Board's determination that the Tazewells were within that area was entitled to no deference, and it then proceeded to make an independent determination that the Tazewells were not within the area (R. 729-732).

ARGUMENT

Introduction and Summary

It may be helpful at the outset to parse the statute that is in issue here—Section 15d of the Tennessee Valley Authority Act, added to the Act in 1959. In pertinent part, it provides as follows:

> Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation

or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

It is evident that Congress envisioned, first, an area in which TVA was the primary but not the sole source of electric power on July 1, 1957. Within this primary area TVA and its distributors are free to supply power

to any customers whether or not they are located within a municipality, and whether or not they have been receiving power from another source. Surrounding the primary area is an area five miles in width, in which TVA power may likewise be supplied to customers who have been receiving power from another source. However, municipalities receiving power from another source on or after July 1, 1957, are excluded from this peripheral area.[6] Outside the primary and peripheral areas TVA power may be made available to customers in areas in which TVA or its distributors had generally established service on July 1, 1957, and to which electric service was not being supplied from another source on the effective date of the amendment.

Whether TVA power may be supplied to consumers in the Tazewells who were receiving electric service from respondent on the effective date of Section 15d thus depends on whether the Tazewells are within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

Before considering this question, it is necessary to decide a threshold issue of jurisdiction: whether a private utility complaining of unauthorized competition by TVA distributors has standing to bring a suit to enjoin such competition. Traditionally, injury from competition has been deemed an insufficient basis for bringing a federal action unless the plaintiff has an exclusive franchise or other privilege to be free from

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[6] Further limitations, not here relevant, are that the peripheral area shall not exceed 2,000 square miles, or include more than 500 square miles within any one State, or include any portion of a State that was not receiving TVA power when Section 15d was enacted.

competition—which respondent here does not claim. Congress can, of course, confer standing in these circumstances if it wishes, but nothing in the text or history of the 1959 amendment suggests an intention to confer a right of action upon private utilities; the absence of any standards to guide a court in delineating the bounds of the primary area strongly indicates that no judicial relief was contemplated.

To be sure, a desire to afford some protection to adjoining utilities appears to have been one of the factors which led Congress to include a territorial limitation. A purpose to protect, however, is not the equivalent of the creation of a private right of action to enforce the protective provision. The distinction is well recognized in the cases. And the absence of a judicial remedy by no means renders the area limitation nugatory, since Congress has effective and continuing supervision over TVA's adherence to its proper area of authority.

On the merits, we begin by invoking the long and firmly established principle that an expert agency's judgment as to the meaning of the statutory terms it administers is entitled to considerable deference. The precept is especially apt where, as here, the statute to be construed is devoid of specific standards, and its construction and application involve considerations within the specialized competence of the agency and are essential to the agency's performance of its statutory function.

We then show that the TVA Board's interpretation of the primary area as embracing the Tazewells was eminently reasonable and should, therefore, have been sustained by the court of appeals whatever the court's

independent view of the statute's meaning. The Tazewells were islands of predominantly private power in an area where TVA was the primary source of power supply on the operative date. The design and legislative history of the area limitation support the view that such enclaves were not excluded from the primary area, and this conclusion conforms to the needs of the communities involved and to the realities of the electrical business.

I. The Tennessee Valley Authority Act Discloses No Purpose to Authorize Private Utility Companies to Bring Suit to Confine the Agency Within the Statutory Limits of Its Power.

At least since the decision of this Court in *Railroad Co.* v. *Ellerman,* 105 U.S. 166, it has been settled doctrine that suit may not be maintained in a federal court to enjoin competition unless the competition invades a legally protected interest. Hence, a suit by a businessman to protect a non-exclusive franchise from competition that was allegedly made possible or assisted by a government official or agency acting unconstitutionally or illegally will not, without more, lie.[7] Re-

[7] *Alabama Power Co.* v. *Ickes,* 302 U.S. 464; *Duke Power Co.* v. *Greenwood Co.,* 302 U.S. 485; *Tennessee Electric Power Co.* v. *TVA,* 306 U.S. 118; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113; and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. See, also, *Rural Electrification Administration* v. *Central Louisiana Electric Co.,* 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Rural Electrification Administration* v. *Northern States Power Co.,* 373 F. 2d 686 (C.A. 8), certiorari denied, 387 U.S. 945; *Pennsylvania R. Co.* v. *Dillon,* 335 F. 2d 292 (C.A. D.C.), certiorari denied *sub nom. American Hawaiian S. S. Co.* v. *Dillon,* 379 U.S. 945; *Pittsburgh Hotels Ass'n, Inc.* v. *Urban Redevelopment Authority,* 309 F. 2d 186 (C.A. 3), certiorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelop-*

spondent here claims no exclusive franchise—no legally protected interested in freedom from competition. And under Tennessee law it is clear that Tazewell and New Tazewell have the right to acquire their own electric systems and to supply power to their citizens in competition with respondent.[8] The situation is thus like that described in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479-480:

> * * * these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

The Alabama Power Company complained of lawful

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ment Authority, 372 U.S. 916; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home Finance Agency*, 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967. Cf. *Johnson* v. *Redevelopment Agency*, 317 F. 2d 872 (C.A. 9). Nor will the plaintiff's allegation of a conspiracy involving federal officials do service for a legally protected interest. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 146-147; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 929-930 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. Moreover, the district court found that no conspiracy existed and this finding was not challenged on appeal.

[8] Tenn. Code Ann. §§ 6-1501 to -1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to -1318 (1955) (Revenue Bond Law); *Keeble* v. *Loudon Utilities*, 370 S.W. 2d 531, 533 (Tenn.); *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22; *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 F. 2d 979 (C.A. 6).

municipal competition aided by what it claimed were unconstitutional federal loans and grants. Here, respondent complains of lawful municipal competition aided by what it says is illegally provided federal power. Such a complaint cannot be entertained, as this Court stated in *Alabama Power Company, supra,* at 481,

> * * * unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted.

The court below sought to distinguish these authorities on the ground that the territorial limitation in Section 15d was enacted for the benefit of private utilities such as respondent. We do not question Congress' power to confer standing on private utilities based on injury through competition. We do question whether merely because a desire to afford some protection to adjoining private utilities was one [9] of the factors which led Congress to impose a geographical limitation on TVA's authority to supply power, it is deducible that actionable rights were conferred on the utilities to enforce this limitation. At the time of the enactment of the 1959 amendment, the prevailing view of stand-

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[9] The complaint concedes: "There were additional reasons for the foregoing area limitations in the said Act" (R. 9).

ing was that typified by the language of the District of Columbia Circuit in *Kansas City Power & Light Co.* v. *McKay, supra,* n. 7, 225 F. 2d at 931, n. 11, decided some four years previously:

> Appellants contend that they are members of a special class for the benefit and protection of which the statutes in question imposed a duty on the defendant public officers to refrain from acting as they have done. But we find nothing in the statutes which creates any duty to benefit and protect public utility companies. Rather it seems plain that Congress reserved the right to supervise the activities of the agencies involved, including the protection of utility companies. *Without some special provision for judicial review we cannot disregard the long established rule that a utility company, the only interest of which is that it may suffer from the competition of a public power program, cannot enjoin the execution of that program.* [Emphasis added.]

In the face of this established and familiar principle, it would appear that had Congress intended to confer standing upon respondent to enforce the 1959 amendment it would have done so in unmistakable language. Yet, one searches the amendment in vain for any indication of such a purpose. There is no provision for notice of, or hearing upon, the agency's determination that a particular city or locality is within the area of permissible service; no provision for administrative or judicial challenge or intervention; and no refer-

ence to "persons aggrieved," [10] persons "whose interests [may be] adversely affected," [11] "any party in interest," [12] or any of the other statutory phrases commonly included when Congress proposes to grant a right to sue in circumstances where traditional doctrine would deny standing. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 476-477.

We do not reason merely from the Legislature's failure to authorize suit expressly. The terms of the amendment themselves imply that no grant of a justiciable right to private utilities was intended. No standards are indicated for guiding judicial decision of a case in which it is alleged that TVA has overstepped the bounds. The amendment refers to "the area" for which TVA was the "primary source of power supply" on a given day, but criteria for delineating that area are nowhere set forth. A reviewing court would be left wholly at large. This suggests that no judicial review was contemplated. Moreover, Congress expressly reserved to itself the right, at any future time, to expand the area within which TVA could be a source of power. This reservation seems at odds with the notion that private power companies were granted a

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[10] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825 l(b); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[11] *E.g.*, Section 701(f)(1) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[12] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

judicially protectible interest in being free from competition by TVA or its distributors. Thus, far from presenting a situation calling for departure from the traditional rules of standing, this case invites their full application.

We are confirmed in this view by the legislative history of the 1959 amendment. Nowhere in that history, or in the bills introduced in earlier Congresses, have we found a statement of intention to relieve Congress of its responsibility for overseeing TVA's operations, and to open the doors of the federal courts to the private utilities.[13] See, *e.g.*, H. Rep. No. 271, 86th Cong., 1st Sess.; S. Rep. No. 470, 86th Cong., 1st Sess.[14]

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[13] It was not suggested that even the rigid Vinson amendment (see p. 30, *infra*), which Congress rejected, would have conferred standing on the private utilities to sue TVA. Thus, in his statement to both committees, Mr. J. J. McDonough, President of the Georgia Power Co., stated his belief that Congress was the appropriate agency to confine TVA within proper bounds:

> There should be no objections, therefore, to the proposal made today by your colleague, the Honorable Carl Vinson, proposing to establish an effective, plainly stated boundary limitation preserving existing service areas. My plea is that this should be done by this committee and that control and supervision of the whole problem be clearly maintained under the Congress. In the event TVA should some time in the future determine that it would be in the public interest for it to expand its service area, then it would be free to come to the Congress for permission to do so.
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> *The Congress and its committees have long been the forum available for the adjudication of differences between agencies of our Government and its citizens. We do not want to lose the opportunity to be effectively heard* [emphasis added].

Hearings before the House Committee on Public Works on H.R. 3460 and H.R. 3461 to Amend the Tennessee Valley Authority Act, 86th Cong., 1st Sess., p. 149; Senate Hearings before a Subcommittee of the Committee on Public Works on S. 931 and H.R. 3460, bills to amend the Tennessee Valley Authority Act of 1933, 86th Cong., 1st Sess., p. 223.

[14] The Senate Report does, to be sure, remark in passing that some proposed statutory language had been rejected in part because its

We are strengthened in our conclusion by the uniform course of decision in the courts of appeals that, merely because an act of Congress affords protection to a particular class of persons, the members of that class have no right of action, in the absence of a showing that Congress intended to confer such a right. One line of cases, decided by the District of Columbia and Fifth Circuits, holds that private power companies may not enjoin loans by the Rural Electrification Administration to rural electric cooperatives that would permit the cooperatives to generate and transmit power in competition with the private companies. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Iowa-Illinois Gas & Elec. Co.* v. *Benson,* 247 F. 2d 22 (C.A. D.C.), certiorari denied, 356 U.S. 949; *Rural Electrification Administration* v. *Central Louisiana Electric Co.,* 354 F.2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. See, also, *Rural Electrification Administration* v. *Northern States Power Co.,* 373 F.2d 686 (C.A. 8), certiorari denied, 387 U.S. 945. In each of these cases, the private power company relied on the provision of Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, prohibiting the distribution of power to areas already obtaining central station power; and argued that the provision, being designed to protect them from competition from REA-financed cooperatives, conferred upon them substantive rights enforceable in the federal courts. In each case, the argument was rejected.

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ambiguity might engender litigation (p. 9). We do not view this casual reference to litigation as evincing a purpose to confer actionable rights on private utilities.

The rationale of the Ninth Circuit's decision in *Johnson* v. *Redevelopment Agency,* 317 F.2d 872, is similar. Residents of an urban redevelopment area sought to enjoin the execution of the renewal project on the ground that the redevelopment agency had failed to comply with the provision of Section 105(c) of the Housing Act of 1949, as amended, 42 U.S.C. 1455(c). That provision requires, as a condition to the extension of redevelopment grants and loans by the federal government, the formulation of a feasible plan for the relocation of families who would be displaced from the urban renewal area. Its purpose was stated by the Senate Committee on Banking and Currency, S. Rep. No. 84, Part 2, 81st Cong., 1st Sess., p. 6, as follows:

> Obviously, slum clearance projects cannot go forward without some difficulties for the families to be displaced. Provisions are therefore included to afford reasonable protection for such families.

Concluding that the plaintiffs lacked standing to enforce Section 105(c)—notwithstanding that they were intended beneficiaries of the relocation-plan requirement—the Ninth Circuit pointed out (317 F.2d at 874):

> * * * The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement. *Gart* v. *Cole,* 263 F.2d 244 (2d Cir. 1959); *Allied-City Wide, Inc.* v. *Cole* 97 U.S. App. D.C. 277, 230 F.2d 827 (1956); cf. *Pittsburgh Hotels Association* v.

Urban Redevelopment Authority of Pittsburgh, 309 F.2d 186 (3rd Cir., 1962).

Also relevant here is *Berry* v. *Housing and Home Finance Agency,* 340 F. 2d 939 (C.A. 2). In *Taft Hotel Corp.* v. *Housing and Home Finance Agency,* 262 F. 2d 307 (C.A. 2), the complaint of a hotel owner attacking the approval by the Federal Housing and Home Finance Agency of an urban renewal plan which included a new hotel, on the ground that there was no need for additional hotel facilities in the city, had been dismissed for want of standing. The following year Congress had amended the Housing Act—apparently at the behest of the American Hotel Association [15]—to provide that no new construction of hotels or other housing for transients was to be included in an urban renewal plan unless the local authorities first made "a competent independent analysis" of the existing transient housing facilities and, as a result of the survey, the FHA Administrator determined that there was a need for additional units of such housing. Berry, the owner of a hotel in Utica, New York, brought suit to enjoin a Utica urban renewal project that included new hotel facilities, charging that no competent inde-

[15] See Hearings on the Housing Act of 1959, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., pp. 755-756 (Statement of Arthur J. Packard, American Hotel Association); Hearings on Housing Act of 1959, before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 1st Sess., pp. 705-707 (same). See, also, Hearings on Housing Act of 1955, before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., pp. 393-394 (Testimony of Arthur J. Packard); Hearings on Housing Amendments of 1955, House Committee on Banking and Currency, 84th Cong., 1st Sess., pp. 452-453 (same).

pendent analysis of the existing supply of transient housing had been conducted. He contended that since the statutory provision requiring such an analysis had been added to the Housing Act in the wake of the *Taft Hotel* decision and was obviously designed for the benefit of owners of existing hotel facilities, a legislative purpose to permit hotel owners to complain in judicial proceedings of violations of the provision could be inferred.

The Second Circuit—affirming the district court's dismissal of the complaint for lack of standing—rejected this contention. It found no indication of any purpose of Congress to permit hotel owners to complain of "[e]conomic loss stemming from lawful competition, even though made possible by federal aid." It noted that "[t]here are instances where an individual has no legal remedy even though a federal law affecting his interests may have been violated," and that, despite the absence of judicial control, Section 410(g) was an effective provision to ensure that federal funds were not expended improperly.

This case is similar. By the TVA amendment, Congress doubtless intended to give a measure of protection from federally assisted competition to private utilities; the Housing Act amendment had precisely the same purpose vis-à-vis hotel owners such as Berry. As the Second Circuit explained, the critical inquiry is whether Congress intended to bestow *legally enforceable* rights on the class it was protecting.

The Second Circuit's observation that a statutory limitation upon a program of federal expenditures (like urban renewal) is not nugatory merely because judicial review is unavailable is especially apt here in

view of the Sixth Circuit's comment that "[i]t would be useless for Congress to include distinct limitations upon the expansion plans of such public corporations as TVA if there was no way to force them to keep within such limitations." 375 F.2d at 417. In fact, Congress has a continuing control over TVA's operations that is wholly adequate, practically as well as theoretically, to check unlawful expansion. While TVA has authority to use the proceeds of bonds in connection with its power program, most of its programs are financed by appropriations and TVA must come before the appropriation committees each year, at which time the committees review TVA's total operations. TVA must also file an annual report with the Congress each year and its operations are reviewed by the General Accounting Office, which likewise reports to the Congress annually. TVA must come before the legislative committees periodically for increases in its borrowing authority and, of course, the Congress is the natural place in which complaints against TVA's operations are lodged. Congress has complete control and can modify or repeal the TVA Act at any time.

The courts have recognized, in circumstances similar to those here, that congressional supervision is an effective—and often the exclusive—means of enforcing statutory limitations on the authority of federal agencies. See *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815; *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686, 700-701 (C.A. 8), certiorari denied, 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, 225 F.2d

924, 931 (C.A.D.C.), certiorari denied, 350 U.S. 884. There is no imperative need to imply a judicial remedy as well.[16]

II. On the Merits, the TVA Board's Determination That the Tazewell Communities Were Within the Area for Which TVA Was the Primary Source of Power Supply on July 1, 1957, Was Reasonable and Should Be Sustained.

A. *The Determination of the TVA Board That a Particular Community Is Within the Primary Area Should be Accorded Substantial Deference, and Upset By a Reviewing Court Only If Unreasonable.*

The initial premise of our argument on the merits is that an agency's area of special competence is not fact-finding alone; the expert agency chosen to administer a statute also has considerable latitude in giving con-

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[16] In holding that respondent had standing in the present case, the Sixth Circuit cited its decision in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830, which had held that a State bank possessing a franchise exclusive as against other branch banks had standing to enjoin the issuance of a certificate by the Comptroller of the Currency authorizing a national bank to establish a new branch in competition with the State bank. See, also, *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252. The branch-banking cases have been distinguished by the Fifth Circuit from cases like the instant one. In *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859, 864 (C.A. 5), certiorari denied, 385 U.S. 815, the Fifth Circuit pointed out that both *Wayne Oakland, supra*, and *Whitney Nat. Bank* v. *Bank of New Orleans*, 323 F. 2d 290 (C.A. D.C.), reversed, 379 U.S. 411, had been brought by banks enjoying a State-conferred privilege to operate free from the competition of branch banks not authorized by the State, whereas the power company had no such privilege.

crete meaning and content to the statutory terms. Recently, this Court, in upholding the Securities and Exchange Commission's construction of the term "loss of substantial economies" as it appears in the Public Utility Holding Company Act, spoke of "the permissible range given to those who are charged with the task of giving an intricate statutory scheme practical sense and application." *Securities and Exchange Commission* v. *New England Electric,* 384 U.S. 176, 185. See, also, *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. 316, 321; *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 408.

The rule, however, is not one of recent origin. As long ago as 1904, this Court stated in *Bates & Guild Co.* v. *Payne,* 194 U.S. 106, 109-110 (emphasis added):

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, *or of law alone,* his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Nor has respondent here. The Sixth Circuit also cited *Stark* v. *Wickard,* 321 U.S. 288, and *Leedom* v. *Kyne,* 358 U.S. 184, but those cases, unlike the one at bar, involved interests which have traditionally been considered judicially protectible. In *Wickard,* the agency ruling deprived the plaintiffs of money to which they claimed they were entitled; in *Leedom,* it infringed the plaintiffs' right of collective bargaining.

Later, in a case arising under the Bituminous Coal Act, the Court declared (*Gray* v. *Powell*, 314 U.S. 402, 413):

> Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Similarly, in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131, the Court held that the agency's determination that specified persons were "employees" within the meaning of the National Labor Relations Act was to be accepted if it had "a reasonable basis in law"; for "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." Again, in *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153, the Court explained:

> To sustain the Commission's application of this statutory term ["active progress" of a labor dispute], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

See, also, *United States* v. *Drum*, 368 U.S. 370; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309; *Labor Board* v. *Coca-Cola Bot. Co.*, 350 U.S. 264; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

Moreover, the courts have uniformly declined to exercise supervisory control over the performance of discretionary functions by executive officers,[17] and the construction by executive officers of statutes under which they act, when there is more than one possible meaning, has been viewed as itself an exercise of executive discretion.[18] As this Court stated in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318, "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *Kadrie*, 281 U.S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 62-63."

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[17] See, *e.g.*, *United States* v. *Wright*, 11 Wall. 648, 650; *Heath* v. *Wallace*, 138 U.S. 573, 585; *Friedman* v. *Schwellenbach*, 159 F. 2d 22, 25 (D.C. Cir.), certiorari denied, 330 U.S. 838. The three cases cited by the court of appeals are readily distinguishable. In *Stark* v. *Wickard*, 321 U.S. 288, this Court held only that petitioners had standing to challenge an order of the Secretary of Agriculture under the Agricultural Marketing Agreement Act; it did not pass on the weight to be given the Secretary's findings. In *Peters* v. *Hobby*, 349 U.S. 331, the Court held that the Loyalty Review Board had acted without authority in considering, on its own motion, the decision of an agency board clearing the employee concerned; the correctness of its action in reversing that decision was not involved. *Leedom* v. *Kyne*, 358 U.S. 184, involved an admitted violation of a clear and unambiguous statute.

[18] This principle has most often been applied in mandamus cases. *E.g.*, *Decatur* v. *Paulding*, 14 Pet. 497; *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40; *United States ex rel. Hall* v. *Payne*, 254 U.S. 343; *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206. But it is equally applicable where the remedy sought is an injunction (*Gaines* v. *Thompson*, 7 Wall. 347; *Brunswick* v. *Elliott*, 103 F. 2d 746 (C.A. D.C.); *Dudley* v. *James*, 83 Fed. 345 (*C.C.D. Ky.*)) or a declaratory judgment (*Doehler Metal Furniture Co.* v. *Warren*, 129 F. 2d 43 (C.A. D.C.), certiorari denied, 317 U.S. 663; *United States ex rel. Jordan* v. *Ickes*, 143 F. 2d 152 (C.A. D.C.), certiorari denied, 323 U.S. 759).

We do not, of course, argue that the degree of deference to be accorded an agency's construction is uniform, regardless of circumstances. As the cited decisions indicate, it makes a significant difference whether the provision in question is cast in very broad and general terms, allowing great latitude for choice and discretion in its specific application, or whether the meaning is readily ascertainable from the statutory context; whether construction involves a knowledge of technical matters on which the agency is presumed to have greater competence than the courts; and whether the determination is not merely peripheral to the agency's responsibilities but an essential predicate of its exercise of the powers delegated to it by the Legislature. By any of these tests, the present case is one where it is appropriate for the courts to confine their reviewing function to the ascertainment of whether the agency's interpretation is a reasonable one.

In question here is the delineation of "the area" for which TVA (or its distributors) constituted on July 1, 1957, "the primary source of power supply" within which TVA may furnish power without limitation or exception. The area is not further defined in the Act. The range of plausible interpretations is obviously great. Geographical, economic and engineering considerations are involved. On the relevant date, TVA supplied more than half of the total electric power consumed in the State of Kentucky. Is all of Kentucky, therefore, within the TVA primary area? Or should the area be determined, rather, on a county-by-county, or even a municipality-by-municipality, basis? Must political subdivisions be used at all, or should the pri-

mary area be delineated in accordance with historic marketing patterns in the electric industry? May still other factors be relevant?

As these questions illustrate, the disputed statutory term is susceptible of a variety of interpretations. Congress painted with a broad brush indeed. By leaving the meaning of the statutory concept undefined, it shifted to the administering agency—TVA—the task of precise interpretation and application to concrete cases. It knew, of course, that the agency would be obliged in every case to make a threshold determination fixing the primary area in relation to the facts at hand, for the TVA Act affirmatively requires that TVA power be made available to public bodies and cooperatives within the permissible area (§§ 10, 12). Given a request for TVA power, the TVA Board must, therefore, determine whether the furnishing of such power would make TVA a source of power supply outside the permissible area—which in turn necessitates a delineation of that area.

The court below completely overlooked this fact. It held that the TVA Board is without authority to make any determination as to what is included in the primary area, stating (R. 729, 734):

> But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. * * *

> We * * * do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957".[19]

The view thus expressed by the court is obviously in error; without first making a determination as to the primary area and its periphery, the Board could neither grant nor refuse a request by a preference customer for power in a doubtful case.

In addition, it is evident that to delineate the area within which TVA power shall be available requires—in the absence of specific statutory standards—a judgment informed by familiarity with local conditions in the Tennessee Valley region and by knowledge and experience of the economics and technology of the electric power industry. Determining the appropriate area in which to confine distribution by a vast power complex is surely no less exacting a judgment for experts than, for example, determining what employment relationships are subject to the National Labor Relations Act. Assuming, *arguendo*, that the judgment required by Sec-

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[19] Correlatively, the court below sought to distinguish the cases cited *supra*, pp. 23-25, on the ground that "they involved the responsibility and right of executive and administrative agencies to make determinations essential to the exercise of granted power" (375 F. 2d at 415, R. 734-735). But, as noted in the text above, that is precisely what is involved here. The determination is essential to the exercise of the power (and duty) to dispose of electric power to preference customers. The court also emphasized that Section 15d speaks in terms of restraint. Actually, it constitutes a grant of unrestricted authority to dispose of electric power within the primary area and a limited grant of authority to dispose of electric power outside the periphery of the primary area. Surely the weight to be given to the TVA Board's determination should not turn on whether limitations on a grant of power are couched in negative or affirmative language. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

tion 15d was intended to be justiciable at all (but see *supra*, pp. 11-22), we submit that the role of the courts is, at most, a limited one; that the TVA Board's discretion to interpret and apply the primary-area concept is broad; and that the court below erred in according the agency's views no deference and substituting its own interpretation without regard to whether that of the agency was reasonable.

B. *The Determination of the TVA Board That the Tazewells Were Within the Primary Area Was Reasonable.*

Tested by the standard of the governing cases—whether the agency's interpretation was a reasonable one—the ruling of the TVA Board that the Tazewell communities were within the primary area of TVA power was, we submit, beyond the power of the reviewing court to disturb. It was eminently reasonable, conforming both to the overall purposes of Congress and to the realities of electric power supply.

The parts of the towns which received their power supply from respondent represented enclaves of private power, wholly surrounded by the lines and services of TVA distributors; and within and around the towns respondent's lines and those of Powell were interlaced. In our view, such pockets of private power may quite reasonably be viewed as within TVA's primary area. While a municipality receiving power from a private utility is barred by the Act from receiving TVA power if the municipality is within the five-mile peripheral area which surrounds the primary area, there is no such limitation upon service within the primary area itself.

Thus, TVA power may be furnished consumers in a town within the primary area, albeit, as in the case of the Tazewells, most of the town's residents previously received power from a private company.

Congress specifically rejected a proposal that would have confined TVA power to the area actually supplied with such power on the operative date, and in so doing made perfectly clear that TVA should be free to supply power in the very circumstances presented in this case. As passed by the House, H.R. 3460 contained an amendment proposed by Representative Vinson providing that TVA facilities should not be used for the sale or delivery of power "for use outside the service area of the Corporation as it existed on July 1, 1957." The Senate Public Works Committee undertook to work out an acceptable compromise between the liberal provisions of the original Senate bill (S. 1869, 85th Cong.)[20] and the stringent limitation contained in the House bill. As reported by the Senate committee, the bill prohibited TVA from entering into contracts which would (a) make TVA a source of power supply for any city, not already served by TVA, having a population in excess of 5,000 (10,000 if it owned its own distribution system); or (b) increase by more than 2½ percent or 2,000 square miles "the area for which the Corporation was the primary source of power supply on July 1, 1957" (S. Rep. No. 470, 86th Cong., 1st Sess., pp. 37-38). The Senate committee rejected the term "service area" in

[20] That bill would have limited TVA service to counties lying wholly or partly within the Tennessee River drainage basin or the service area in which TVA power was being used on July 1, 1957, together with additional areas extending not more than five miles beyond the boundaries of such counties.

the House bill as unduly rigid and ill-suited to the TVA situation. It explained its substitute language as follows (*id.*, p. 8):

> The committee recognizes the problems inherent in an attempt to establish a rigid boundary for limitation of power service.
>
> * * * * * *
>
> The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power. The proposed amendment would permit an increase of the lesser of: (a) 2½ percent of the area for which TVA was the *chief or principal supplier* of power on July 1, 1957, or, (b) 2,000 square miles. [Emphasis added.]

The committee thus made clear its understanding that the area for which TVA was the "primary source of power supply on July 1, 1957" was not limited to the area in which it was the sole supplier of electricity on that date and its intention to leave TVA with sufficient flexibility to permit common-sense adjustments to be made. It stated, further (*id.*, p. 9):

> The committee believes that this provision would permit minor adjustments within, and around the periphery of, the TVA area * * *. Within the general area receiving TVA power there are small

> areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

This was an exact description of the situation which exists in the Tazewells. If the committee intended to permit "adjustments" in the "small areas served by private power entirely surrounded by the lines of TVA distributors" and in the "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced," it must have intended to permit TVA power to be made available in those areas to consumers receiving power from another source.

Senator Randolph made this clear in his supplemental views. He took issue with the committee version of the bill solely because it did not require that the 2,000-square-mile area of maximum permissible expansion be contiguous to the primary area (*id.*, pp. 55-56):

> The permitted expansion of TVA is not required to be in territory contiguous to the area now served. Hence, TVA transmission lines could be extended anywhere in the peripheral States now receiving service from TVA. * * *
>
> . . . . .
>
> Inasmuch as the expansion which would be authorized by the Senate committee's recommended amendment is not required to be in areas contiguous to the present TVA territory, such expansion

> could penetrate the entire service area of any utility in any one of the authorized States.

He then made this significant observation (*id.*, p. 56):

> Of course, consistent with this view TVA should be encouraged to serve any "islands" which now exist within its geographical operating area as it existed on July 1, 1957.

The "islands" he was referring to were, of course, the "small areas served by private power entirely surrounded by the lines of TVA distributors" mentioned in the committee report.

Consistently with these views, Senator Randolph, together with Senator Talmadge, offered on the Senate floor an amendment which, with some immaterial changes, was adopted by the Senate and accepted by the House. The amendment retained the basic concept of the Senate committee—an area for which TVA was "the primary source of power supply on July 1, 1957" [21]

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[21] Senator Kerr, Chairman of the Senate committee and Senate floor manager for the bill, sought and obtained unanimous consent that the Randolph-Talmadge amendment be treated as a committee amendment, saying (105 Cong. Rec. 13048):

> * * * in my judgment the amendment does what the committee sought sincerely to do * * *.

Obviously, it was his view, to which no one objected, that the amendment was consistent with the Committee's rejection of the "service area" concept and its desire to permit elasticity and adjustment within and around the primary area. Representative Davis, the House floor manager for the bill, explained the bill passed by the Senate as follows (105 Cong. Rec. 14114):

> As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area * * *.

—while confining the peripheral area of 2½ percent or 2,000 square miles within five miles of the boundary of the primary area.

There is further evidence that Congress contemplated that the Tazewells would be within the primary area of TVA. Area limitations were considered in three successive Congresses before Section 15d was enacted and in each the Senate and House Public Works committees had before them maps showing the approximate outline of the area supplied with TVA power.[22] On these maps, the Tazewells are shown to be within the primary area supplied by TVA. It is true that these maps are "rough approximations," as stated by the court below; and we do not urge that they delineate the exact periphery of the primary area. But they do show, in general, what Congress deemed included within that area. The area that is shown as the TVA area on these exhibits comprises approximately 80,000 square miles and this was the basis for deriving the 2,000-mile figure in the provision that the peripheral area may contain 2,000 square miles or 2½ percent of the primary area, whichever is the lesser. Respondent itself presented a map to the House committee in the 86th Congress (TVA Exhibit No. 92) showing the area involved in this litigation as within the "present TVA service area" (R. 573-74; Ex. Vol. I, sheet 8b, R. 552).[23]

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[22] TVA Exhibit No. 94 (Ex. Vol. I, sheet 5b, 569-71) was before the Senate committee in the 84th Congress; TVA Exhibit No. 95 (Ex. Vol. I, sheet 6b, R. 571-72) was before the House committee in the 85th Congress; TVA Exhibit No. 96 (Ex. Vol. I, sheet 7b, R. 572) was before the House committee in the 86th Congress.

[23] It also presented KU Exhibit No. 100 (Ex. Vol. I, sheet 9b, R. 586-87), a map showing that respondent also had service within Claiborne County.

Nor is it irrelevant to the delineation of the TVA boundary as including the Tazewells to consider the need of the residents and industries of the communities themselves for the more economical power available from the TVA distributor, and the fact that in concentrating upon the towns, and declining to serve most of the surrounding rural areas, respondent was apparently following a deliberate policy of skimming off the most lucrative power business in the area and leaving the less profitable rural business to TVA distributors. Surely it was not in the mind of Congress to perpetuate a situation where the development of a municipality is stultified owing to the chaotic condition of power supply and rates which now prevails in the Tazewells.

These considerations are persuasive of the soundness of the TVA Board's application of the Act in this instance. Perhaps, if the court below were free to consider the question wholly by its own lights, with no regard for the responsible agency's view, it could properly have adopted a contrary view—although we think not. But the judgment, as we have urged, was not one initially committed to the court. Its role (if there is any room for judicial review) is to review the reasonableness of the Board's determination; and it is plain, we think, that the Board's interpretation was, at the least, a reasonable application of a statute that is devoid of concrete standards.

It remains only to note that the court of appeals' independent construction of Section 15d rests on a clear misunderstanding of the basic facts and law. The court held that the Tazewells were not islands of predominantly private power because they were connected

by a single line to respondent's primary service area located farther to the north. But the Tazewells are typical of the "islands" of private power referred to by the Senate committee and by Senator Randolph. The normal source of power supply for such "islands" is, of course, transmitted power; that is how the utility business operates.

Furthermore, the court below seems not to have understood that Congress rejected the service-area concept embodied in the Vinson amendment in favor of the very different primary-area concept. Thus the court erroneously stated (375 F. 2d at 411-412, R. 727):

> * * * Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

Starting from the premise that "primary area" and "service area" mean the same thing, the court proceeded as though the problem were one of delineating the respective service areas of neighboring utilities. Instead of determining what TVA's primary area was, it sought to determine the boundaries of respondent's service area. Its reasoning was: on July 1, 1957, the Tazewells were supplied principally by respondent and therefore were within respondent's service area; if the Tazewells were within respondent's service area they could not be within the area for which TVA was the primary source of power supply. This is a *non sequitur*. Congress rejected the proposal of the Vinson amendment to confine TVA power to the area actually served

by it on the operative date. It substituted the concept that TVA power may be supplied anywhere within the area for which TVA was the primary—not exclusive—source of power supply. Obviously, that area was intended to be broader than the area actually served by it and its distributors on July 1, 1957.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss respondent's complaint.

Respectfully submitted.

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OCTOBER 1967.

APPENDIX

TENNESSEE VALLEY AUTHORITY ACT

Section 10, 11, 12, 15d(a), 48 Stat. 64 *et seq.*, as amended and added, 16 U.S.C. §§ 831i, 831j, 831k, 831n—4(a)

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,*

That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further,* That the board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further,* That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction . [48 Stat. 64, as amended, 16 U.S.C. 831i.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit

of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 Stat. 64-65, 16 U.S.C. 831j.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided,* That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree

to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time

as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is an excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65-66, 16 U.S.C. 831k.]

SEC. 15d. (a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $750,000,000 [1] outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this Act, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional

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[1 In 1966, increased to $1,750,000,000 by P.L. 89-537.]

area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from

entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: *Provided further,* That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this Act shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 26 of this Act or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such

manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this Act, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law. [As added, 73 Stat. 280, and amended, 73 Stat. 338, 16 U.S.C. 831n-4(a).]

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No. 40

EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, ET AL., *Petitioners*,

vs.

KENTUCKY UTILITIES COMPANY

No. 56

POWELL VALLEY ELECTRIC COOPERATIVE, *Petitioner*,

vs.

KENTUCKY UTILITIES COMPANY

No. 61

TENNESSEE VALLEY AUTHORITY, *Petitioner*,

vs.

KENTUCKY UTILITIES COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 40, 50 and 51

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, et al.,

Petitioners,

v.

KENTUCKY UTILITIES COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, KENTUCKY UTILITIES COMPANY

This Brief is filed on behalf of the respondent, Kentucky Utilities Company (hereafter called "KU"), in response to Briefs previously filed in the above styled consolidated actions by the petitioners, Edward J. Hardin and James B. DeBusk, as Mayors of Tazewell and New Tazewell, Tennessee, respectively (hereafter called "the Cities"), Powell Valley Electric Cooperative (hereafter called "Powell Valley") and the Tennessee Valley Authority (hereafter called "TVA").

The Statute Involved

The pertinent provisions of Section 15d(a) of the Tennessee Valley Authority Act, 16 USC ¶ 831n-4(a) are set forth in petitioners' Briefs and reprinted in the appendix to this Brief (*infra* p. 3a). The statute will hereafter be referred to as the "1959 TVA Act".

The Questions Presented

The 1959 TVA Act expressly prohibits TVA from entering into contracts which would have the effect of making TVA or TVA distributors a source of power supply outside the area for which TVA and its distributors were the primary source of power supply on July 1, 1957. In 1963, a TVA distributor, Powell Valley, pursuant to arrangements with TVA, began supplying electric power to customers in the Cities of Tazewell and New Tazewell, Tennessee, which customers (1) had been previously served by KU, and (2) were located in a part of a geographically contiguous area comprising a small part of northeastern Tennessee and a large part of Kentucky, which area was served by KU and not served by TVA or its distributors on July 1, 1957, and at all times prior and subsequent thereto up to 1963. The questions presented are:

(1) Whether an investor-owned utility has standing to maintain an action to enjoin TVA from supplying power to customers and areas now served by such utility, on the ground that the supply of such power would be in contravention of the provisions of the 1959 TVA Act.

(2) Whether the Court of Appeals, based on the undisputed facts of this case, correctly construed the provisions of the 1959 TVA Act as prohibiting TVA service in the area of the Cities in question served by KU on July 1, 1957.

(3) Whether the Court of Appeals exceeded the permissible scope of judicial review in reaching a conclusion

of law as to the proper interpretation of the 1959 TVA Act, which interpretation was contrary to the interpretation of the TVA Board of Directors in this action.

Statement

In seeking to overturn the decision of the Court of Appeals in this case, the Petitioners place primary reliance on two jurisdictional or procedural arguments: (1) that KU has no standing under the TVA Act to challenge violations of the Act; and (2) that the Court of Appeals exceeded the permissible scope of judicial review in reaching a conclusion as to the proper interpretation of the Act contrary to the interpretation of the TVA Board of Directors and the District Court. Due perhaps to the emphasis on the jurisdictional and procedural questions, the Briefs of the petitioners contain a very limited and selective exposition of the facts of the case. The basic operative facts underlying this action are not and have never been in dispute among the parties, and it is against this factual background that the question of whether the Court of Appeals correctly interpreted and applied the statute must be determined. The following is a brief summary of the undisputed facts of the case which were available to the TVA Board when it made its determination as to the meaning of the Act and its application to the facts of this case.

KU is an investor-owned public utility which renders retail and wholesale electric service in a large part of the State of Kentucky from the Mississippi River eastward to the eastern border of Kentucky and extending into a part of northeastern Tennessee adjacent to Kentucky. The

entire southern boundary of the KU service area is contiguous to the area served by TVA and its distributors. The area in question in this case is that small area of northeastern Tennessee immediately adjacent to and southeast of the point where Kentucky, Virginia and Tennessee come together.

From 1920 to the present day KU and its predecessor corporation, Dixie Power and Light Company, have been the sole supplier of electric energy in that area of Claiborne County, Tennessee, extending from the Kentucky, Tennessee border at Cumberland Gap, Tennessee, south and east in a corridor approximately 15 miles long, which corridor includes all but a small part of the Cities of Tazewell and New Tazewell, Tennessee.[1] KU is the owner of a perpetual franchise, granted to Dixie Power and Light Company in 1926, to construct and maintain its power lines along any of the public ways of Claiborne County, including the public ways in the Cities of Tazewell and New Tazewell, which were incorporated in 1954. In 1954 Dixie Power and Light Company was dissolved and all of its property, including this franchise, was transferred to KU and the acquisition of the franchise was expressly approved by the Railroad and Public Utilities Commission of Tennessee. In 1952, KU also obtained and now owns another franchise granting it the right to maintain transmission and distribution lines along the county highways between Cumberland Gap and New Tazewell in Claiborne County.[2]

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[1] R. 328.

[2] R. 329-332, 411.

Pursuant to these franchises, KU, or its predecessor corporation, has for many years prior and subsequent to the enactment of the 1959 TVA Act maintained extensive transmission facilities and a distribution network serving an unbroken line of customers down the highway from the Kentucky border at Cumberland Gap, Tennessee, to and including the Tazewells and on beyond into the area south of New Tazewell.[3] Other parts of Claiborne County, Tennessee, were, on July 1, 1957, and are now, being supplied with electric service by two distributors of TVA power, the petitioner, Powell Valley, and the City of LaFollette, Tennessee, municipal electric system.

The location of all of the customers and electric lines of the two TVA distributors in Claiborne County, Powell Valley and the City of LaFollette, are shown on the map of Claiborne County filed as Exhibit 38.[4] This map was prepared by Powell Valley and TVA. Superimposed on this map are the primary distribution lines of KU in Claiborne County, shown by red dotted lines, and also the KU transmission lines, shown with a heavy red line. As acknowledged by Powell Valley's manager, it would be impossible to show all of the customers and secondary distribution lines of KU on a map of this scale due to their density.[5] While the map is, therefore, not an accurate comparison of the facilities of the TVA distributors on the one hand and KU on the other, it does show the general area served by the TVA distributors and the area or corridor of KU service extending from Cumberland Gap,

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[3] R. 328-329, 407-410; Ex. 37-R. 408, 772.

[4] Ex. 38-R. 410, 773.

[5] Ex. 83-R. 537, 793.

Tennessee, down the highway to the Tazewells and on south of New Tazewell.

As stipulated by the parties, on July 1, 1957, the key date in the 1959 TVA Act, KU served 344 customers in Tazewell and Powell Valley served 20 customers. In New Tazewell, KU served 217 customers and Powell Valley served 8. Thus, in the two towns combined, KU served a total of 561 customers to Powell Valley's 28, or 95.3% of the customers and 94.1% of the energy delivered.[6] As shown on Exhibit 25,[7] a map prepared by petitioners, of the 28 customers in the Cities served by Powell Valley on July 1, 1957, one customer was in the extreme southwestern portion of the City and the other 27 customers are spread out along the southeastern edge of the Cities. These customers were located at the ends of rural lines and the lines had either been extended into the city limits or the city limits had been expanded to include the last few customers on these rural lines.[8] On the other hand, as shown on Exhibit 23,[9] KU's facilities blanketed the entire town and every residence or place of business in each town could be served by the KU facilities.

Outside the two towns in the area extending from the Tazewells north and west to the Kentucky-Tennessee border at Cumberland Gap, Tennessee, KU maintained a transmission line and extensive distribution facilities serving continuous unbroken line of customers between the Tazewells and the Kentucky border and in this 14 to 15

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[6] R. 84, 380-384.
[7] Ex. 25-R. 386, 758.
[8] R. 388.
[9] Ex. 23-R. 384, 757.

mile corridor served over 1,200 customers. These customers are located in and around the communities of Cumberland Gap, Harrogate, Shawanee, Tiprell, Arthur and up and down the highway between Cumberland Gap and Tazewell.[10]

As of July 1, 1957, the two TVA distributors in Claiborne County, Powell Valley and the City of LaFollette, taken together, served a total of 3,564 customers in the County and on the same date KU served 1,839 customers. During the months of June and July, 1957, Powell Valley and LaFollette, taken together, supplied an average of 1,015,000 kwh of electric energy per month within Claiborne County and KU supplied an average of 610,000 kwh per month. Thus, KU served 33.8% of the customers and supplied 37.5% of the energy being supplied in the County, and as between KU and Powell Valley, KU supplied more energy in the County than Powell Valley on July 1, 1957.[11] KU has no dispute with the City of LaFollette as to their respective service areas in the County.

The undisputed facts of this case further demonstrate that both TVA and Powell Valley have consistently recognized, from a time long before July 1, 1957, up to the institution of this litigation in 1963, that KU was the exclusive supplier of electric service in the area of Claiborne County in question, that is, the area extending from the Kentucky-Tennessee border south and east in a corridor approximately 15 miles long, to and including most of the Cities of Tazewell and New Tazewell.

In 1952, KU, TVA and Powell Valley entered into an agreement relative to the supply of electric energy in Clai-

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[10] R. 407-410, 445.

[11] R. 84, 441-442.

borne County, including the two Tazewells and surrounding areas. As a part of this tripartite agreement, KU and Powell Valley entered into a letter agreement dated August 22, 1952, pursuant to which each of these utilities agreed that it would not "serve any customer who is receiving service from the other party."[12] In January, 1958, KU and Powell Valley entered into a second, more detailed, territorial agreement which provided among other things, that any new loads would be served by the utility whose facilities taking into consideration territorial boundaries either fixed or following from logical considerations, were closest to the load.[13]

In connection with the 1952 agreement between TVA, KU and Powell Valley, TVA furnished to KU a map prepared by TVA for the express purpose of "showing the areas now served by LaFollette Electric Department, the Powell Valley Electric Cooperative, and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee."[14] In 1960, after the passage of the 1959 TVA Act, KU's division manager and the manager of Powell Valley decided that it would be helpful in implementing the 1958 territorial agreement if a map were prepared to define the respective service areas of KU and Powell Valley in Claiborne County. Accordingly, in early 1960 Powell Valley and KU each designated a representative to work together in the preparation of such a map. The two representatives worked together in the field and prepared a precise and detailed map clearly defining at all points the boundary between the respective service areas of KU and

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[12] R. 332-333, 360.

[13] R. 335-338, 361-362.

[14] Ex. 36-R. 402, 769; R. 400.

Powell Valley.[15] Based on their field work the boundary line was superimposed on a United States Geological Survey map of the area.[16] Supplementing this basic map were four large scale maps showing the service area boundaries within Tazewell and New Tazewell.[17] The two managers of the utilities then reviewed and agreed upon the map as defining the respective service areas and the map was thereafter used by both managers for the resolution of questions as to the service area and service to individual customers.[18]

In addition to the above maps, one made by TVA and the other by KU and Powell Valley jointly, for the express purpose of defining the boundaries of KU's service area in Claiborne County, there are 10 other maps in evidence in this case made and published by TVA from the years 1956 through 1963 which show that there was a corridor of KU electric service in Claiborne County extending without interruption from the Kentucky-Tennessee border to and including Tazewell.[19]

Thus, the stipulated or undisputed facts of this case show that there was, on July 1, 1957, and is today, an area

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[15] R. 363-364. The two representatives who prepared the maps were Harry Rowe of Powell Valley and John Osborne of KU, both of whom testified in this case as to the preparation of the map (see R. 370-378). The map was referred to throughout the case and will be referred to herein as the "Rowe-Osborne map."

[16] Ex. 14-R. 366, 807-808. The top half of the map is also found at R. 973 and the bottom half at Exhibit Volume 1, sheet 4b.

[17] Ex. 15 through 18-R. 366, 753-756.

[18] R. 364-365.

[19] Ex. 26-R. 395, 759 (This exhibit and Exhibit 33 are reproduced in color, similar exhibits 27 through 32, 34 and 35 are reproduced in black and white only). Ex. 27 through 34-R. 395, 760-767; Ex. 35-R. 399, 768.

of Claiborne County, Tennessee, extending without interruption from the Kentucky-Tennessee border to and including most of the Cities of Tazewell and New Tazewell which was and is served exclusively by KU and that this area of KU service is contiguous to the remainder of the KU service area in Bell County and elsewhere in Kentucky; and it is further undisputed that both TVA and Powell Valley have consistently recognized, both before and after the 1959 TVA Act, the existence of this area of KU service.

It is against this factual background, which will be more fully developed in subsequent portions of this Brief, that the Court of Appeals was required to test the validity of the determination of the TVA Board of Directors that the whole of Claiborne County, Tennessee, was within the area for which TVA was the primary source of power supply.

The events immediately leading to this litigation may be summarized briefly as follows. On February 4, 1960, representatives from Middlesboro, Kentucky, and a representative from Tazewell, Tennessee, met with the TVA Board of Directors for the purpose of obtaining a TVA power contract for Middlesboro. TVA officials advised these representatives that the 1959 TVA Act prevented TVA service to Middlesboro, Kentucky, but that it would be legally possible for TVA to serve Tazewell, Tennessee, and it was suggested that Tazewell might make arrangements with Powell Valley for TVA service.[20] The following year TVA officials concluded that the 1959 TVA Act would preclude TVA from rendering service in the Cumberland Gap area of Claiborne County served by KU, and

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[20] Ex. 98-R. 578, 811.

expressed serious doubts about the legality of TVA service in the Tazewells, suggesting that a court decision might be helpful.[21]

Subsequently a number of meetings were held and correspondence exchanged among TVA, Powell Valley and representatives of the Cities of Tazewell and New Tazewell for the purpose of arranging for TVA service for the Cities.[22] On October 16, 1962, Powell Valley purported to terminate the 1958 territorial agreement with KU and subsequently the Cities offered to purchase KU's distribution system, which offer was refused by KU.[23] Thereafter, in response to specific requests from the Mayors of the two Cities, TVA, by letter dated September 23, 1963, advised the manager of Powell Valley that TVA would supply Powell Valley with the necessary power requirements to serve the Cities of Tazewell and New Tazewell.[24]

On October 30, 1963, contractors employed by the Cities, or Powell Valley, began removing KU's meters from the meter sockets on its customers' buildings and inserting meters of Powell Valley, to connect KU customers to the electric distribution system of Powell Valley. During the succeeding several weeks some 20 customers of KU in Tazewell and New Tazewell were taken over by Powell Valley in this manner.[25] KU, accordingly, filed its Com-

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[21] Ex. 70-R. 215, 853-854.

[22] At one of these meetings between representatives of Powell Valley and TVA, at which no representatives of the Cities were present, methods were discussed of "putting pressure" on KU, such as approaching the Tennessee Utilities Commission to order KU out of the towns. Ex. 62-R. 110, 956; Ex. 74-R. 238, 908.

[23] R. 338-340.

[24] Ex. 82-R. 265, 934.

[25] R. 425-436, 467-475.

plaint in this action on November 7, 1963, to prevent the further taking of its customers and business and to recover those customers taken by the defendants on or after October 30, 1963.

On August 26, 1964, some 8½ months after the beginning of this litigation and about 3 weeks before the trial of the action in the District Court, TVA's Board of Directors adopted a resolution purporting to "find and determine" that all of Claiborne County, Tennessee, was within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and further "finding" that the "periphery" of the TVA service area in Claiborne County, Tennessee, was the Kentucky-Tennessee border.[26] During discovery proceedings in this action, and prior to the adoption by the TVA Board of the above resolution, it developed that TVA had in fact made no attempt to determine the exact location of the perimeter of its service area in Claiborne County and the Board resolution was obviously prompted by that fact.[27]

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[26] Ex. 93-R. 553, 796.

[27] In the deposition of Mr. G. O. Wessenauer, TVA's manager of power, taken on August 12, 1964, two weeks before the adoption of the Board resolution, the following questions and answers were made:

"Q. Now, Mr. Wessenauer, a question has arisen in this case with respect to Claiborne County, and I would like to ask you how you would draw a line across that county depicting where the boundary of TVA service should stop under the terms of the Act?

A. I don't know the answer to that.

Q. Has any officer or representative of TVA given you any advice about that?

A. About what?

Q. About the drawing of the line, where it—what factors would govern the drawing of the line?

A. Well, I think the factors that would govern that would be provided for in the Act.

After trial of the action, the District Court entered a judgment dismissing the Complaint. After holding that KU had standing to maintain the action and that the determination of the TVA Board of Directors was subject to judicial review, the Court concluded on the merits that:

> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that *Congress* in the 1959 Act *intended* to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957." (237 F. Supp. at p. 514.)[28]

On appeal, the Court of Appeals reversed the judgment of the District Court, one judge dissenting. The Court of Appeals upheld the District Court's decision that KU had standing to sue and held that "the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this Appeal." (375 F. 2d at p. 415.) On the merits, the Court of Appeals, after a summary of the undisputed facts and a review of the meaning and purpose of the 1959 TVA Act as disclosed in

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Q. And where would you draw it then, this Claiborne County, specifically?

A. I don't know; I haven't looked at it.

Q. Who would have the function in TVA of drawing that line?

A. Well, it would—if a line has to be drawn, it would be after an examination of all of the facts and I presume that we would get the advice of our Legal Department as to the meaning of the law with respect to any particular situation, and in light of that advice and the facts that we would have, we would ascertain where the line would be." (R. 296)

[28] Emphasis, unless otherwise noted, is added.

the Act itself and its legislative history, held that the area in question was outside the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA and its distributors were, therefore, forbidden by statute from making contracts for the sale or delivery of power in that area. Judge Edwards, dissenting, agreed with the Court that the TVA Act conferred standing on KU to bring the action, but concurred with the District Court on the merits.

Summary of Argument

With respect to the question of the standing to maintain this action, the position of KU rests not on any general right to be free from competition of the Federal power programs but a specific right created by statute to be free from the very competition by TVA herein complained of. The statutory prohibition against the geographic expansion of TVA electric service was enacted for the special purpose of protecting KU and those other electric utilities operating in areas adjacent to the TVA service area from competition by TVA and its distributors. KU is not complaining of lawful competition made possible by the unlawful act of others, as to which it has no special interest, but competition declared to be unlawful by a statute enacted for the very purpose of protecting KU and others similarly situated from such competition. The protection of KU's competitive position vis a vis TVA and its distributors is a right or privilege created by statute for its benefit, and under such circumstances this Court has historically held that a right of action under the statute will be implied.

In the introduction to the argument section of the Brief for the petitioner, TVA, there is set forth TVA's interpretation of the 1959 TVA Act. Since this interpretation is at odds with the Congressional intent, as shown by the legislative history of the Act, and contrary to the interpretation of the Act made by the Court of Appeals, we will first briefly discuss the several provisions which restrict the geographic area of permitted TVA service.

The 1959 TVA Act contains one basic limitation on the area in which TVA can supply power, followed by several carefully circumscribed exceptions to this basic limitation. TVA service is basically limited to the geographic area for which TVA or its distributors were the primary source of power supply on July 1, 1957. This area includes and is limited to the geographic area where the customers and lines of TVA and its distributors were physically located on the key date. The term "primary" source of power supply, as opposed to "sole" source, was used not for the purpose of permitting TVA to expand its service area beyond the geographic limits of its distribution lines and customers but to take care of those situations where customers and lines of the TVA distributors might be so interlaced with the customers and lines of neighboring utilities that no exact border could be established. In such cases TVA distributors could extend service to the edge of the area where their customers were located.[29]

[29] Such is not the case here as a definite boundary exists between the KU service area and that of Powell Valley and was depicted on the detailed Rowe-Osborne map, prepared by KU and Powell Valley jointly, after the Act was passed and before this controversy arose.

To this basic limitation there are four exceptions: (1) TVA service may be extended to such additional area not more than 5 miles around the periphery of the existing service area as may be necessary to care for the growth of TVA and its distributors within the TVA service area, *except* that such 5-mile growth area is subject, among others, to the condition that no part of such additional area may be in a municipality receiving electric service from another source on or after July 1, 1957 (e.g., Tazewell and New Tazewell); (2) TVA or its distributors may serve customers in areas in which TVA had "generally established electric service on July 1, 1957," provided that such areas were not receiving electric service from another source on the effective date of the Act, August 6, 1959. From the legislative history it is clear that this provision was intended to cover isolated areas, or "islands" wholly surrounded by the service area of TVA, and not receiving electric service from any source on the date of the Act; (3) TVA may serve certain specifically named cities and customers which are expressly excepted from the prohibitions of the Act, which cities include some at a considerable distance from the existing TVA service area and some cities which were completely surrounded by the TVA service area; (4) TVA may make exchange power arrangements with other utilities with which it had such arrangements on July 1, 1957.

The petitioners do not contend that any of the above exceptions in the Act apply to this case. Their sole contention is that the part of Claiborne County, Tennessee, served exclusively by KU is somehow inside or a part of the area for which TVA was the primary source of power supply. On the merits there is no factual or legal dis-

tinction between the area of Claiborne County, Tennessee, served by KU and any other part of the KU service area along the 300 mile boundary between the KU and TVA service areas. Such an arbitrary extension of the TVA boundary renders the 5-mile exception nugatory. If TVA service is permitted to replace KU service in Tazewell and New Tazewell, even though these Cities were not excepted from the provisions of the Act, the specific exception for other cities, some of which were wholly surrounded by the TVA service area, is likewise rendered meaningless.

The only reasons advanced by petitioners for placing the boundary of the TVA area through the middle of an area served exclusively by KU are (1) TVA distributors served most of Claiborne County, and (2) TVA exhibited certain large scale maps to Congressional committees, which were admittedly rough approximations, showing all of Claiborne County as within the TVA area. With respect to the first of these contentions Congress considered and rejected a Bill which would have permitted TVA service in the whole of any county party served by TVA, in favor of legislation restricting TVA to the area actually served by it. As for the second contention, it certainly cannot be implied that Congress intended to define the TVA area as an area shown on inaccurate maps exhibited at committee hearings. The Court of Appeals properly rejected these arguments and based its determination on the only valid consideration, the undisputed facts as to the geographic area where TVA power was actually being distributed in 1957.

Finally, we turn to the question of whether the Court of Appeals, in rejecting the interpretation placed upon

the Act by TVA, exceeded the permissible scope of judicial review. It is well settled under the decisions of this Court that the determination of whether an administrative agency has exceeded its statutory authority is a proper judicial function, and particularly is this true in those cases where an express statutory limitation on agency powers is involved. The statute in question contains precise standards limiting the permissible area of TVA service and the TVA Board simply ignored plain limitations on its authority.

The petitioners contend the determination of the TVA Board was entitled to deference by the Court of Appeals and could be overturned only if unreasonable. Even if this were considered to be the proper rule respecting the scope of judicial review of this type of agency action, the Court of Appeals gave ample deference to the conclusions of the TVA Board, and properly found them to be unreasonable.

ARGUMENT

I.

The 1959 TVA Act confers a right or privilege on KU to be free from the competition of TVA supplied power in areas outside the TVA service area as it existed in 1957, which right is entitled to judicial protection.

In its Complaint in this action, KU alleges that TVA and the other defendants have appropriated, and unless enjoined will continue to appropriate to themselves the electric utility business and customers of KU within Tazewell and New Tazewell, in violation of the provisions of the 1959 TVA Act expressly prohibiting the rendering of electric service by TVA or its distributors in such areas. The petitioners contend that KU has no standing to maintain this action against them.

The petitioners' contentions in this respect may be summarized as follows: (a) As KU does not have an exclusive franchise to supply electric service to the Cities of Tazewell and New Tazewell it is not entitled to be free from the competition of TVA and its distributors in that area, and the damage to KU from such competition is, therefore, *damnum absque injuria;* and (b) The 1959 TVA Act does not expressly provide for the institution of civil actions based upon violations of the Act and, absent such express provisions, no right of action will be implied.

KU admittedly does not have an exclusive franchise for the sale of electricity in the area served by it in Claiborne County and is not claiming a right to be free from any competition in the area, nor is it seeking generally to enjoin or restrain the execution of Federal power programs. On the other hand, KU does have a valid franchise to engage in the electric utility business in all parts of Claiborne County, including Tazewell and New Tazewell, and presently serves approximately 2,000 customers in the county and derives annual revenues of approximately $178,000 from its operations in Tazewell and New Tazewell alone.[30]

Being lawfully engaged in the sale of electric power in Claiborne County, KU does have a right under the 1959 TVA Act to enjoin the defendants from engaging in competition with KU, which competition is specifically declared to be unlawful under statutory provisions enacted for the purpose of protecting KU and others similarly situated from this type of competition. Although the 1959 TVA Act contains no express provisions concerning civil suits, the authorities discussed below demonstrate that

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[30] R. 328.

such express provisions are not a necessary condition to the bringing of an action to protect rights granted by Federal statute.

A. The purpose of the territorial limitation provisions in the 1959 TVA Act is to protect investor-owned utilities from competition by TVA and its distributors in geographic areas then served by such utilities.

It cannot seriously be questioned, and indeed petitioners do not question, that the intent and purpose of Congress, in enacting the territorial limitation provisions of the 1959 TVA Act, was to protect the business of investor-owned utilities operating in the areas adjacent to the TVA service area from competition by TVA and its distributors. During the four-year course of the passage of this legislation through Congress the provisions were amended from time to time to meet specific objections raised by representatives of the utilities at the several hearings. Proponents of the provisions in both Houses of Congress, including the authors of both the House and the Senate versions, specifically stated that their intent was to protect investor-owned utilities from competition by TVA, and all of the hearings and debates on the territorial limitation provisions centered upon the protection of investor-owned utilities.

The legislative history is replete with statements concerning the intent of Congress to protect utilities and only a few examples will be noted here.

In the course of the hearings before the House Committee on Public Works, Representative Vinson, testifying

in favor of his amendment to the area limitation provisions, stated:

> "I appear this morning in support of an amendment to this bill which [sic] permit TVA to supply adequate power needs in its present area; will adequately protect the Federal Government; will adequately protect purchasers of TVA power and investors in TVA bonds; and *will also protect* the municipalities of Georgia, the taxpayers of Georgia, *the stockholders of the Georgia Power Co., the employees of the Georgia Power Co., as well as thousands upon thousands of individuals who have investments in private utility companies.*"[31]

In conclusion, Representative Vinson stated:

> "I offer no apology for appearing here today on behalf of the municipalities of Georgia, as well as the Georgia Power Co. The Georgia Power Co. is a private utility system owned by private citizens. It has 8,910 stockholders, 6,600 of whom are citizens of Georgia.
>
> "*My amendment very clearly protects my constituents who are stockholders in the Georgia Power Co.*, and most importantly, the municipalities of my district who do business with the Georgia Power Co."[32]

Representative Boykin, testifying at this hearing in favor of the Vinson amendment, stated:

> "I am speaking for our entire Alabama delegation that has the service of the Alabama Power Co. in their mind. . . . I don't want any public business to put any private business out of business."[33]

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[31] Hearings before House Committee on Public Works, March 10-11, 1959, 86th Cong., 1st Sess., p. 110 (No. 86-3, H.R. 3460).

[32] Id at p. 115.

[33] Id at p. 122.

In addition to the several Congressmen who testified at the hearings in favor of the Vinson amendment, officers of the investor-owned utilities most immediately affected by the threat of TVA expansion also testified at length. With reference to the testimony of one of these officers, Harllee Branch, Jr., President of the Southern Company, Representative Wright stated:

> "I think I can say to the gentleman, without fear of contradiction, that most of the members of this committee want to be fair and reasonable in this matter and to protect the legitimate interests, both of such private utility companies, as our witness represents, and of the TVA."[34]

In the Report of the Senate Committee on Public Works it is stated:

> "In summation, the committee believes that H.R. 3460, as amended, is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; . . . *protect the areas now being served by private utilities;* . . ."[35]

Senator Randolph in his Supplemental Views to the Senate Committee Report, stated:

> "It would be inadvisable *to permit excessive competition by TVA to encroach on the areas served by these and other investor-owned public utilities, to si-*

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[34] Id at p. 129-30.

[35] S. Rep. No. 470, 86th Cong., 1st Sess., p. 9 (July 2, 1959); 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2008 (1959).

phon off their customers and to destroy the value of their properties.''[36]

In the course of the Senate debate on H.R. 3460 Senator Cooper voiced his objections to the Randolph amendment as too restrictive of the expansion of TVA but stated that he would nevertheless vote for passage of the bill "because I have sponsored self-financing from the outset. I respect the service of private utilities in my own State."[37] Senator Holland, speaking in support of the area limitation, noted that the unlimited expansion of TVA would result in "jeopardy" to the investors in "private power facilities."[38] Senator Kerr, Chairman of the subcommittee which considered the bill, speaking in favor of the Randolph amendment, stated:

> "[T]he Tennessee Valley Authority needs this bill, and the utilities in the surrounding areas are entitled to have their status settled, as is the Tennessee Valley Authority."[39]

Senator Randolph made extensive remarks in support of his amendment, some of which were as follows:

> "But it is a duty of Congress to see that the creation of TVA to provide a yardstick to measure the equity and efficiency of private utility rates not result in the fashioning of a walking stick which TVA could use *to encroach upon and destroy investor-owned elec-*

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[36] Id at p. 55.

[37] 105 Cong. Rec., p. 13053 (July 9, 1959).

[38] Id at p. 13054.

[39] Id at p. 13055.

tric energy companies, their fuel suppliers, and the jobs of many individuals.

* * *

"As TVA expands and takes over investor-owned company customers, it impairs the values of private enterprise properties and makes financing difficult.

* * *

"[A]s I pointed out in my supplemental views on H.R. 3460 as published in connection with the committee report on this measure, I am aware that there seems to persist the question of whether or not the language of the House bill, or the provisions of the amendments recommended by the Senate Committee on Public Works, would be the most effective in accomplishing these objectives:

"First. Permit TVA to perform its functions and meet its responsibilities without, at the same time, doing violence to the investor-owned power companies by encouraging TVA encroachment.

"Second. Provide TVA with self-financing capacity and capability, but, in so doing, not excessively impair the ability of the private electric utilities contiguous to TVA to maintain themselves and provide financing for their own operating areas and customer expansion needs.

* * *

"I am concerned lest Congress should enact language which might have the end result of destroying the stability and serviceability of investor-owned power systems which have served their areas and their customers well."[40]

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[40] Id at p. 13060.

Senator Byrd, echoing the views of Senator Randolph, stated:

> "At the same time, Mr. President, I also recognize the necessity for protecting the tremendous investments of private enterprise in the privately owned utility systems. * * *
>
> "Under the circumstances, my position is clear, I am in favor of the objective sought here so long as a fence is built around the boundaries of TVA, so long as the *legitimate interests of private enterprise are protected* . . . ."[41]

The foregoing are only samples of the numerous statements contained in the legislative history of the Act which demonstrate, without doubt, that the primary, if not the sole purpose of the territorial limitation provisions was to protect the business of investor-owned utilities operating in areas adjacent to the TVA area.

B. Given the purpose of the statute to protect KU and others similarly situated from the competition herein complained of, KU has standing to enjoin such competition.

The question presented here is under what circumstances does a complainant have standing to challenge competition by, or under authority of, agencies of the Federal Government. From the decided cases of this Court the answer is clear. A complainant may challenge such competition when it has a right, created by statute, to be free of the competition.[42] Of course, not every statutory

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[41] Id at pp. 13060-61.

[42] As stated by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123, 153-54, "The common law does not recognize an interest in freedom from honest competition; a court will give protection from competition by the Government, therefore, only when the Constitution or a statute creates such a right."

provision which tends to benefit a complainant's competitive position will create enforceable rights, but if the purpose of the statute is to protect the plaintiff from competition, a right to enjoin the competition prohibited by the statute will be inferred. The proper question is not "Is the plaintiff's only injury one of competition?" but rather "Is the plaintiff complaining of competition made unlawful by a statute enacted for the purpose of protecting him from such competition?" This distinction is the thread of the numerous cases which have been decided on the issue of standing to enjoin competition.

For example, since the decision of this Court in the *Chicago Junction Case*,[43] it has been held that competing railroads have standing to challenge orders of the Interstate Commerce Commission which affect their competitive position. In that case the Commission had entered an order approving the acquisition by the New York Central Railroad of the control of two independent terminal railroads in Chicago. Competing trunk lines which had heretofore used the services of the terminal railroads brought an action in the Federal district court to have the order of the Commission and the resulting acquisition set aside, and for injunctive relief. On appeal to this Court from a dismissal of the bill by a three-judge district court, it was held that the plaintiffs had standing under the Transportation Act of 1920 to challenge the order of the Commission, as a party in interest within the meaning of the statute. The Court noted that prior to the enactment of the Transportation Act of 1920, the New York Central would have been free to acquire the terminal railroads and exclude competing carriers from the use of the terminals.

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[43] *Baltimore & Ohio R. R.* v. *United States*, 264 U. S. 258.

Applying the test of the statutory purpose the Court stated:

> "But Transportation Act 1920 repealed that provision in § 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a *special interest* in the proposal to transfer the control to that company." (264 U. S. at p. 267)

Three justices dissented on the ground that the Act did not create any special rights in the plaintiffs and that the action was therefore one to vindicate the rights of the public generally as to which there was no standing. The issue which divided the Court was, therefore, whether the act evinced a purpose to protect the interest of competing carriers from certain types of competitive action, thereby creating a special interest in competitors, or whether it was merely declarative of broad public policy as to which competing carriers had no interest apart from the public generally.[44]

In subsequent cases involving the Transportation Act of 1920, the views of the majority in the *Chicago Junction Case* prevailed.[45]

Subsequently, in *Frost* v. *Corporation Commission,* 278 U. S. 515, it was held that one having a valid but non-exclusive franchise from the state to operate a cotton gin had

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[44] See the dissenting opinion of Mr. Justice Sutherland, 264 U. S. at pp. 271-273.

[45] See *Texas & Pacific Ry.* v. *Gulf C. & S. F. Ry.,* 270 U. S. 266; see also *Alton R. R.* v. *United States,* 315 U. S. 15; *American Trucking Assn's* v. *United States,* 364 U. S. 1.

standing to enjoin the state corporation commission from issuing a license to a competing company on the ground that the statute under which the competitor's license was issued was unconstitutional. While the decision is couched in the language of a "property right," the gravamen of the complaint was that statutory licensing provisions enacted to protect the plaintiff from unlawful competition were being unlawfully circumvented.

Standing to complain of competition which by statute is in itself unlawful was also upheld in *Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U. S. 77. In this case the court, although ultimately finding against the complainant on the merits, stated with respect to standing:

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing Alabama Power Co. v Ickes, 302 US 464, 82 L ed 374, 58 S Ct 300, and Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 US 118, 83 L ed 543, 59 S Ct 366. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. Cf. Bell v Hood, 327 US 678, 90 L ed 939, 66 S Ct 773, 13 ALR2d 383. Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can

lawfully operate without a certificate of convenience and necessity.'" (357 U.S. at pp. 83-84)

On the other hand, a complainant has no standing to enjoin competition which is lawful in itself merely on the grounds that it is made possible by the unlawful act of others.[46] Thus, we would agree with the statement contained in the Brief for TVA (p. 11) that:

> "At least since the decision of this Court in Railroad Co. v. Ellerman, 105 U. S. 166, it has been settled doctrine that suit may not be maintained in a federal court to enjoin competition *unless the competition invades a legally protected interest.* Hence, a suit by a businessman to protect a non-exclusive franchise from competition that was allegedly made possible or assisted by a government official or agency acting unconstitutionally or illegally will not, *without more,* lie."

We further agree that KU is not claiming an exclusive franchise, but we most certainly do claim a "legally protected interest in freedom from competition" based upon the 1959 TVA Act, which claim has been upheld by the lower courts in this case. It is this claim which distinguishes this case from the cases principally relied upon in the Briefs of the petitioners, *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118.

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[46] Thus, in *Railroad Company* v. *Ellerman,* 105 U. S. 166, a wharfinger was held to have no standing to enjoin the lease of railroad property to a competing wharfinger on the ground that the railroad was acting ultra vires in leasing the property. The plaintiff had no common law right to be free from the competition of the lessee wharfinger, and the breach by the railroad corporation of its statutory charter did not constitute a breach of any duty owed to the plaintiff apart from the public generally.

There is a certain surface similarity between these cases and the case at bar. Each of the foregoing cases involved a suit by public utilities to enjoin officers or agencies of the United States from taking certain actions or executing certain contracts which would have had the effect of increasing competition between the public utilities and various federally subsidized agencies or cooperatives. But here the similarity ends. In the foregoing cases the competition by the public power agencies was legal in itself and was not prohibited by a federal statute enacted for the purpose of protecting the public utilities from such competition. The actions of the various officers and agencies were attacked on the grounds that either the statutes authorizing such activities were unconstitutional or the officers and agencies had exceeded the authority admittedly granted to them by statute. In each of these cases it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise and that, accordingly, no common law or statutory rights of the plaintiffs had been invaded.

In *Alabama Power Co.* v. *Ickes,* supra, the Federal Emergency Administrator of Public Works, acting pursuant to authority granted to him under the Emergency Relief Appropriations Act of 1935,[47] entered into certain agreements with cities in Alabama providing for the making of loans and grants by the Administrator to the cities for the construction of municipal electric distribution systems. Sections 202 and 203 of the Act contained sweeping provisions authorizing the Administrator to prepare comprehensive programs of public works including the transmission of electric energy and to make grants to municipal-

[47] 49 Stat. 115, 119.

ities and otherwise aid in the financing of such public works projects. In affirming a dismissal of the action for lack of standing to sue this Court held that (1) the plaintiff had no standing as a taxpayer to question the authority of the Federal Administrator to make the loans and grants, because a taxpayer, per se, under the rule of *Massachusetts* v. *Mellon,* 262 U. S. 447, has no right to enjoin the expenditure of funds from the federal treasury and (2) the plaintiff had no exclusive franchise and the competition complained of was not in itself prohibited by statute and accordingly no common law or statutory rights of the plaintiff had been invaded, citing *Railroad Co.* v. *Ellerman,* 105 U. S. 166.[48] The Court likened the position of the plaintiff to one who was about to suffer "injurious consequences from the lawful use of money about to be unlawfully loaned . . ." (302 U. S. at p. 480), and concluded that:

> "considered apart, the lender owes the sufferer no enforceable duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any *lawful* way the borrower may choose." (302 U.S. at p. 480)

Applying this analogy to the case at bar TVA does owe KU an enforceable duty to refrain from supplying power outside the TVA service area by virtue of the statutory protection afforded KU under the 1959 TVA Act. Similarly, Powell Valley and the Cities owe a duty to KU to refrain from distributing TVA power in a manner declared unlawful by the Act; i.e. have "the effect, directly or indirectly," of making TVA "or its distributors" a source of power supply outside the TVA service area.

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[48] Supra, note 46.

The Court itself recognized the distinction, noting that under the *Chicago Junction Case*, supra, competitive rights may be asserted where a special interest is recognized by statute and further that a plaintiff, as in *Frost* v. *Corporation Commission*, supra, may complain of competition which is unlawful in itself.

The decision of this Court in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, supra, is similar to that reached in the *Alabama Power Co.* case. In this case certain public utilities sought to enjoin TVA from generating, transmitting, and selling electricity in competition with the utilities on the ground, primarily, that the provisions of the TVA Act[49] authorizing such activities were contrary to the Tenth Amendment of the Constitution respecting powers reserved to the states. Again, the utilities had no exclusive franchise and they had no special statutory interest or right to be free from the threatened competition. The Court accordingly held that the plaintiffs had no standing, concluding that the action could not be maintained "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." (306 U.S. at p. 137)

Petitioners also make reference in their Briefs to the case of *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, in support of their contention that KU has no standing to maintain this action. This action involved the construction of the Public Contracts Act of June 30, 1936[50] concerning minimum wage conditions in industries selling supplies to the Federal Government. The plaintiffs sought to enjoin

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[49] 16 USC § 831, et seq.

[50] 41 USC § 35 (Walsh-Healy Act).

the Secretary of Labor and others from enforcing certain minimum wage determinations on the ground that the Secretary had incorrectly interpreted the statutory guide lines for making such determination. In holding that the plaintiffs had no standing, the Court once again looked to the purposes of the statute relied upon and found that such purposes were not for the protection of the plaintiff but on the contrary for the protection of the Government, stating "It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. . . . The duty is imposed upon the officers of the Government . . . . that duty is owing to the Government and no one else." (310 U. S. at p. 126).

The rule educed from the foregoing cases,—if the purpose of the statute is to protect the competitive position of the plaintiff standing will be implied but if the statute is not intended to create rights in the plaintiff apart from the rights of the public generally standing will be denied—has been consistently applied in numerous lower court decisions, including the National Banking Act cases relied upon by the lower courts in this action[51] and the cases arising under the Rural Electrification Act,[52] the Federal

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[51] *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir.), cert. denied, 358 U. S. 830; *Whitney National Bank* v. *Bank of New Orleans*, 323 F. 2d 290 (D.C. Cir.), reversed on other grounds, 379 U. S. 411; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770 (D.D.C.), affirmed, 278 F. 2d 871 (D.C. Cir.). See also *Commercial Security Bank* v. *Saxon*, 236 F. Supp. 457 (D.D.C.), affirmed, 385 U. S. 252 (the issue of standing was not raised before this Court).

[52] *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (D.C. Cir.), cert. denied, 350 U. S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (5th Cir.), cert. denied, 385 U. S. 815; *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 686 (8th Cir.), cert. denied, 387 U. S. 945.

Housing Acts,[53] and the Merchant Marine Act,[54] cited in petitioners' Briefs.

For example, in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6th Cir.), cert. denied, 358 U. S. 830, a state bank sought to enjoin the United States Comptroller of the Currency from issuing a certificate of authority to a national bank to open a branch bank in the same city where the state bank had an existing branch. Pursuant to the National Banking Act,[55] a national bank is authorized, subject to the approval of the Comptroller of the Currency, to establish branch banks at any place within the state in which the bank is situated, if such establishment is expressly authorized for state banks by the statutes of the state in question and subject to the restrictions as to location imposed on state banks by state law. The applicable Michigan statute[56] provided that no branch bank might be established in a city in which a state or national bank or branch thereof was then in operation. On appeal from the order of the district court granting the injunction, the Comptroller of the Currency asserted that

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[53] *Pittsburgh Hotels Ass'n, Inc.* v. *Urban Redevelopment Authority*, 309 F. 2d 186 (3rd Cir.), cert. denied sub nom. *Hilton Hotels Corp.* v. *Urban Redevelopment Authority*, 372 U. S. 916; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (7th Cir.), cert. denied, 373 U. S. 914; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (2nd Cir.); *Taft Hotel Corp.* v. *Housing and Home Finance Agency*, 262 F. 2d 307 (2nd Cir.), cert. denied, 359 U. S. 967.

[54] *Pennsylvania R. R.* v. *Dillon*, 335 F. 2d 292 (D.C. Cir.), cert. denied sub nom. *American Hawaiian S. S. Co.* v. *Dillon*, 379 U. S. 945.

[55] 12 USC § 36c.

[56] Mich. Stat. Ann. § 23. 762.

the plaintiff had no standing to sue. In rejecting this contention the Court of Appeals stated:

> "As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, *and injury from a competition which was prohibited by the federal statutes* subjecting national banks to the same rules of law as cover state banks. The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual *or by exertion of unauthorized federal administrative power*, it is entitled to have such controversy adjudicated." (252 F. 2d at p. 544)

A similar result was reached by the Court of Appeals for the District of Columbia Circuit in the case of *Whitney National Bank* v. *Bank of New Orleans*, 323 F. 2d 290 (D. C. Cir.), reversed on other grounds, 379 U. S. 411. In the course of its opinion upholding the standing of the plaintiffs to seek an injunction against the Comptroller, the Court made the following pertinent comments respecting standing:

> "The Comptroller's brief contends that 'appellees can point to no legal or actionable wrong to them arising from the opening of a new national bank.' It is, of course, true, as held in Alabama Power Co. v. Ickes, . . . that one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which

simply increases the amount or effectiveness of competition.

* * *

"The state banks say that thus they have a right, under the combination of federal and state statutes, to be free of the competition in east Jefferson Parish which would result if Whitney of Orleans Parish is allowed to establish branches in east Jefferson where the state law forbids them to go. The state banks allege further that the Comptroller is not authorized to permit, but rather is prohibited by law from permitting, Whitney of New Orleans to establish branches in east Jefferson, *and that his unlawful act in doing so would result in illegal competition and a consequent violation of their right, guaranteed by state and federal statutes, to be free of such competition.*" (323 F. 2d at pp. 298-99).

The Court clearly distinguished that case from *Alabama Power Co.* v. *Ickes,* supra, and its own prior decision in *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir.), cert. denied, 350 U. S. 884, and similar cases, stating:

"The distinction between this case and those cited by the Comptroller as to standing to sue was carefully drawn by the Supreme Court in Alabama Power Co. v. Ickes, . . . when it said:

" 'Frost v. Corporation Commission, 278 U. S. 515. 49 S. Ct. 235, 73 L.Ed. 483, relied upon by petitioner, presents an altogether different situation. . . . We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant company. See Corporation

Commission v. Lowe, 281 U. S. 431, 435 [50 S. Ct. 397, 74 L.Ed. 945]. *The difference between the Frost case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful.*' [Emphasis supplied by the Court.]

"Although the Frost case is not factually identical with this one, it is sufficiently similar to be dispositive of the question of standing. The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. *The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court* to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.'"[57]

In the instant case, as in the National Banking Act cases, KU is seeking to enjoin the defendants from engaging in unlawful competition specifically prohibited by the

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[57] On appeal this Court (379 U. S. 411) reversed the decision of the Court of Appeals on the ground that pursuant to the Bank Holding Company Act, 12 USC § 1846, the question of the propriety of the establishment of the holding company in question and its subsidiary bank must be determined in accordance with the administrative procedures set forth in the Holding Company Act and should properly be determined in an appeal from an order of the Federal Reserve Board then pending before the Fifth Circuit. The Court was careful to point out that "we do not say that under no circumstances may the Comptroller be restrained in equity from issuing a certificate to a new bank." (379 U. S. at p. 423). See also *Commercial Security Bank* v. *Saxon*, 236 F. Supp. 457, affirmed, 385 U. S. 252.

1959 TVA Act. KU, like the banks in the cases cited above, does not have an exclusive franchise to be free from any lawful competition from other utilities. But, as in the case of the banks, it has a right to be free from illegal competition in contravention of the proscriptive provisions of the Act, which provisions were designed to protect KU and other public utilities from that very competition.

Turning now to the several lower court decisions involving the Rural Electrification Act,[58] we see again that each of these decisions is based upon a determination by the courts that the provisions of the Act in question were not enacted for the purpose of protecting the plaintiffs from competition. The plaintiffs in these cases were seeking to enjoin the Rural Electrification Administration (REA) from making loans to cooperative groups for the purpose of constructing electric generation and transmission facilities in competition with existing facilities of the public utility plaintiffs. The utilities contended that they had standing to maintain the actions based upon the provisions of the Rural Electrification Act[59] and regulations issued thereunder, and in particular under the provisions of 7 USC § 904 which authorizes the administrator to make loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service . . ." The plaintiffs contended that the making by the Administrator of loans to cooperatives which might result in sales of electricity to consumers who

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[58] Supra, Note 52.

[59] 7 USC § 901 et seq.

were not living in rural areas or to consumers who were then receivinig central station service from existing utilities was contrary to the provisions of the Act; that the central station language was inserted in the Act for their protection, and, accordingly, they had standing to sue.[60]

Rightly or wrongly, each of the lower courts which has considered this question has determined that the purpose of the provisions of the Rural Electrification Act and regulations thereunder relied upon by the several plaintiffs was *not* to protect public utilities from competition but to properly conserve federal funds for the benefit of the cooperative borrowers as well as the Treasury, and for the ultimate benefit of the rural population served by the cooperatives.

As stated in *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 686 (8th Cir.), cert denied, 387 U. S. 945:

> "If anyone is the beneficiary of the regulation, it is the rural consumer of cheap but efficient electrical energy. The intent of the regulation is to assure the borrower, not the private power supplier, the 'most advantageous power supply arrangement.'
>
> It is difficult to conclude that the purpose of the regulations is to provide previously nonexistent rights to the private power supplier . . . In administering the REA program 'freedom from competition' is not

[60] In what is apparently the only case which decided this question on the merits, *Missouri Power & Light Co.* v. *Lewis County Rural Electric Cooperative Association*, 235 Mo. App. 1056, 149 S. W. 2d 881, it was held that so long as the purpose of the loans was to foster rural electrification, the fact that consumers in other than rural areas who were receiving central station service might also be served was immaterial.

a legitimate end of the legislation or the regulations promulgated thereunder. More appropriately, we feel the responsibilities under the regulation are as set forth in its preamble. The language and the legislative background of the regulation makes it apparent that Congress was merely seeking a more effective means to police the REA loans. Under such circumstances we find Congress did not intend to create any legally enforceable rights for the private power supplier." (373 F. 2d at p. 696)

It was also noted in the REA cases[61] that Congress retained effective control over loans to the REA by virtue of the appropriation process and review by the Comptroller General. It is precisely this lack of control over the electric power program of TVA by virtue of the proposed financing of the program through the public issuance of bonds, which led Congress to enact the territorial limitation provisions of the 1959 Act. This was put most clearly by the authors of both the Senate and the House versions of the territorial limitation provisions. Thus, Senator Randolph, in his minority views appended to the Senate Committee report stated:

> "Unwarranted extension of facilities and service to meet normal TVA growth requirements for its basic customer area has heretofore been controlled by:
>
> "(1) Appropriations by the Congress; and
>
> "(2) A gentlemen's nonencroachment agreement between TVA and the investor-owned power companies.
>
> "*Since TVA expansion would no longer be controlled through the appropriation procedure,* it is

[61] Supra, note 52.

essential that limitations compatible with the gentlemen's agreement now existing should clearly be established in this legislation."[62]

The same point was made by Representative Vinson, author of the House version, speaking in favor of passage during the final debate.[63] Thus, the very purpose of the territorial limitation provisions was to provide protection for public utilities in the *absence* of congressional control through the appropriations procedures. This is not to say, of course, that Congress retains no control over TVA's electric power program. It created TVA, and could abolish it, and, similarly, could deny it the power in the future to borrow additional funds from the public. But, Congress acknowledged that by permitting TVA to finance its operations through public bond issues it was surrendering a measure of control over the TVA power program and that public utilities would no longer be adequately protected against TVA expansion by reason of congressional control of the purse strings.

In the cases concerning the Federal Housing Acts, relied upon by petitioners,[64] the denial of standing to the

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[62] S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 56, 2 U. S. Code Cong. & Ad. News 86th Cong. 1st Sess., p. 2021.

[63] Mr. Vinson stated:

"So long as the Congress of the United States had to provide appropriations for any expansion programs, there was, for all practical purposes, no need for a statutory limitation on the expansion of the TVA service area.

"But now that it is proposed by the President, and by a majority of the Congress, that TVA issue revenue bonds for the purpose of building new generating and other facilities, the question of territorial expansion becomes a grave one not only to the privately owned utility systems that operate adjacent to TVA, but also to the future of all privately owned utility systems throughout the Nation, . . ." 105 Cong. Rec. p. 14121 (July 23, 1959).

[64] Supra, Note 53.

plaintiffs was again predicated on the lack of congressional intent to protect the plaintiffs, in this case property owners affected by urban renewal programs. As stated in *Berry* v. *Housing and Home Finance Agency*, 340 F.2d 939 (2nd Cir.):

> "Appellants attempt to distinguish the Taft Hotel case on the claim that the 1959 amendment to the Housing Act, 42 U. S. C. § 1456(g), gave them the requisite standing. *There is, however, no indication either in the language of the amendment or in the legislative history of any such intent.* Section 1456(g) is an apt provision to safeguard the predominantly residential character of urban renewal projects and to insure that the limited Federal funds available for assistance to such projects shall not be expended for commercial hotels if they are not needed." (340 F. 2d at p. 940)

Again, as in the REA cases, the court simply found, whether rightly or wrongly, that the statute in question was not enacted for the purpose of protecting the plaintiffs, but for other general public purposes.

Likewise, in *Pennsylvania R.R.* v. *Dillon*, 335 F. 2d 292 (D. C. Cir.), cert. denied sub nom. *American Hawaiian S.S. Co.* v. *Dillon*, 379 U. S. 945, the requisite congressional intent to protect the plaintiff shipping company was expressly found lacking.

The proper rule to be derived from the various cases involving standing to sue to enjoin competitive action has been well stated by Professor Jaffe:

> "Thus, the clue to standing in these cases has been to look as did Brandeis in *Chicago Junction*, to the statutory purposes. If protection of the competitive

> position is one—it need not, as we have insisted, be the only—purpose, then the plaintiff's stake in his competitive position is 'legally protected' and he has standing. I do not mean to assert that a statute's purpose on this score is always plain. Many licensing schemes are quite obviously directed toward the mitigation of the competitive rigor, and others are not. Is the plaintiff's continued well-being one of the statute's concerns? This is the question, rather than the abstract, vague, ill-focused query whether the plaintiff has a 'definite legal right to be imune from competition.' "[65]

This is the rule that has been followed in the many cases decided on the question, both by this Court and the lower courts. Applying this rule to the case at bar there can be no question that KU has standing to maintain this action and the lower courts have so held in every previous case involving the 1959 TVA Act.[66]

C. It is not a necessary condition of KU's standing to sue that the 1959 TVA Act expressly authorize civil suits.

Petitioners have contended that the absence of any provisions in the 1959 TVA Act authorizing civil suits or administrative review precludes the bringing of this action. The proper rule is in fact the opposite of this contention. Judicial review of administrative action is the rule and not the exception and a right to review will be presumed unless the statute provides to the contrary.

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[65] Jaffe, Judicial Control of Administrative Action, pp. 509-10 (1965).

[66] In addition to the decisions in the two lower courts in this action, standing to sue under the 1959 TVA Act has been upheld in interlocutory orders in two other cases, *Georgia Power Co.* v. *Tennessee Valley Authority,* Civil No. 1788 (N. D. Ga.); and *Kentucky Utilities Company* v. *Tennessee Valley Authority,* Civil No. 4385 (W. D. Ky.).

It has long been established that a right of action may be implied in favor of one injured as a consequence of a violation of a Federal statute, even though the statute contains no express provision for civil remedies. *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33.[67]

In what is perhaps the leading case concerning the presumption in favor of judicial review of administrative action, *Stark* v. *Wickard*, 321 U. S. 288, this Court stated:

> "When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." (321 U. S. at p. 309)

This presumption in favor of judicial remedies was indulged in *Stark* v. *Wickard*, even though the statute in question provided an administrative remedy for certain classes of persons not including the plaintiff. The judicial remedy has even been upheld in the face of a statute which purported to make the administrative decision "final." *Harmon* v. *Brucker*, 355 U. S. 579.[68] As stated in *Leedom* v. *Kyne*, 358 U. S. 184; "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

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[67] "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, . . . 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute . . . for the recompense of a wrong done to him contrary to the said law.'" 241 U. S. at p. 39.

[68] See also *Brownell* v. *Tom We Shung*, 352 U. S. 180.

The presumption in favor of judicial review has been strengthened with the enactment of Section 10 of the Administrative Procedure Act.[69] We do not contend that any new substantive rights have been created by this statute but it can certainly be said to supply a remedy if one be lacking, and the exemption of agency action from judicial attack, whether by appeal from applicable administrative proceedings or by original suits in equity, will not be inferred unless the statute in question clearly so provides.[70] Therefore, the absence of provisions for judicial review does not imply a lack of standing to challenge allegedly unlawful acts of the petitioners.

Petitioners point to the lack of any provisions in the Act for notice of or hearing upon TVA's determination as to the boundaries of the area in which it is permitted to be a source of power supply and a corresponding lack of any provisions in the Act for appeals by "persons aggrieved" etc. From the lack of such provisions in the 1959 TVA Act and the presence of provisions for administrative proceedings and judicial review thereof in a number of federal regulatory acts, it is argued that Congress intended to deny standing to utilities to contest violations of the Act. The regulatory acts referred to by the petitioners, the Federal Power Act, the Federal Communications Act, and others[71] concern the delegation by Congress of the power to regulate individuals and businesses in various fields of commerce. In order to accomplish the

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[69] 5 USC § 1009.

[70] *Brownell* v. *Tom We Shung,* 352 U. S. 180; *Freeman* v. *Brown,* 342 F. 2d 205 (5th Cir.). Cf. Shaughnessy v. Pedreiro, 349 U. S. 48.

[71] See Brief for TVA, p. 15 n. 10-12.

regulatory purposes it is necessary, also, to establish proper administrative procedures for rule making and for adjudication of controversies among the class to be regulated. The manner and scope of judicial review of such quasi-legislative and quasi-judicial activities on the part of the regulatory agencies is frequently specified in the statutes. In the instant case, TVA is not a regulatory agency, the TVA Act does not confer upon TVA any rule making power with respect to the utility industry or any power to adjudicate controversies among KU and other utilities or between TVA and KU. Under these circumstances, provisions in the statute for administrative proceedings and judicial review thereof would be singularly inappropriate.

On the other hand, it is obvious from the legislative history of the Act that Congress fully expected that questions concerning the proper interpretation of the Act would be the subject of litigation and that the rights conferred on utilities by the Act would be judicially protected. The Senate Committee on Public Works rejected the House version of the bill for the reason, among others, that:

> "The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds by TVA."[73]

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[73] S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 9; 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2008 (1959). The Senate Committee version was subsequently rejected on the floor of the Senate in favor of a modified form of the House version.

The Senate Committee believed that its version of the bill would "reduce the possibility of *litigation* and confusion arising from ambiguous terms."

In the debate in the House of Representatives just before final passage of the bill Representative Davis of Tennessee, the floor manager of the bill, in explaining the Senate amendment which added the five-mile expansion provisions, stated:

> "The Senate has changed this bill in this regard. They recognized that the House provision would undoubtedly lead to extensive litigation around the periphery of the area so receiving TVA power."[74]

There is no indication in the legislative history of the Act that Congress was of the opinion that utilities would have no standing to seek judicial protection of the rights being conferred on them by the Act. On the contrary, the bill was amended for the stated purpose of eliminating ambiguities which might prove troublesome in subsequent litigation.

II.

The Court of Appeals correctly construed the provisions of the 1959 TVA Act as prohibiting TVA electric service in an area of Claiborne County, Tennessee, served exclusively by KU on July 1, 1957.

As there is no factual dispute present, we will first discuss the meaning of the Act as disclosed by the statutory language itself and the legislative history.

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[74] 105 Cong. Rec. 14112 (July 23, 1959).

A. The History and Meaning of the Act.

As noted by the Court of Appeals (375 F. 2d at pp. 410-412), the 1959 TVA Act was the result of some four years of legislative effort and a number of bills, some with and some without territorial limitations, were unsuccessfully introduced from 1955 to 1959. In 1959, H.R. 3460 of the 86th Congress was introduced and this Bill, with substantial amendments, was finally enacted.

Four separate versions of the territorial limitation provisions were considered in the course of the passage of H.R. 3460 through both Houses of Congress. These versions were: (1) the version originally introduced in the House, (2) the version reported out of the House Committee and passed by the House (the so-called "Vinson Amendment"), (3) a substantially different version reported out of the Senate Committee, and finally (4) the version introduced on the floor of the Senate by Senators Talmadge and Randolph and subsequently enacted into law. (the so-called "Randolph Amendment"). For convenience, the four versions are reproduced in an appendix to this Brief.

The version originally introduced in the House of Representatives contained a provision which would have restricted TVA service to those counties "which lie in whole or in part within the Tennessee River drainage basin or the service area in which power generated by the Corporation [TVA] is being used on July 1, 1957," plus an additional area five miles around the boundaries of such counties. At the hearings on this Bill[75] representatives of public utilities operating in areas adjacent to the TVA service

[75] Hearings before House Committee on Public Works, 86th Cong., 1st Sess., March 10-11, 1959 (No. 86-3, H.R. 3460).

area strenuously objected to these provisions. Their objections were based upon the fact that the boundaries of the existing service area of TVA did not conform to county boundary lines. As a result, the Bill would not have served the purpose of limiting TVA expansion but would have been an invitation to TVA and its distributors to extend service to the borders of any county which was then only partly served by TVA (e.g. Claiborne County), and to invade those counties in the Tennessee River drainage basin then served by other utilities. It was estimated that such expansion would increase the existing TVA service area by some 31%[76] and drastically affect the business of the utilities operating in areas adjacent to TVA. Among those objecting to the bill was R. M. Watt, Board Chairman of KU. In the course of his statement to the House Committee, Mr. Watt presented a map[77] showing the territory served by KU in Kentucky, Virginia, and Claiborne County, Tennessee, stating:

> "The territory shown in red at the right hand side of the map covers three counties in western Virginia in which the subsidiary, Old Dominion Power Co., renders service, *and one county in Tennessee in which the company renders service,* all of which counties lie in the Tennessee river drainage basin. The provision of the bill would permit expansion of TVA service in those counties . . ."[78]

At this point, in response to such objections to the existing Bill, Representative Vinson appeared before the Committee and offered an amendment which provided that the

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[76] Id at p. 150, 198.

[77] Ex. 100—R. 587, Ex. Vol. II Sheet 9b.

[78] Hearings, supra note 75 at p. 230.

facilities of TVA would not be used "for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957."

In offering his amendment, Mr. Vinson noted that TVA then served approximately 80,000 square miles and the Bill as introduced in the House would authorize an expansion of the TVA area by approximately 25,000 square miles.[79] He further noted that "TVA has been operating within its present area for many years under a gentlemen's agreement between TVA and surrounding private utility companies," and stated that the purpose of his amendment was to convert the "gentleman's agreement" into law.[80] The subsequent legislative history contains many references to the so-called "gentleman's agreement" between TVA and neighboring utilities (such as the 1952 agreement among KU, Powell Valley and TVA) and also to the 80,000 square mile service area of TVA.

The Committee adopted the Vinson Amendment and, after adding a specific exception to the service area limitation for eight named cities in Tennessee and Kentucky, the Bill was reported out of Committee, passed by the House, and referred to the Senate Committee on Public Works, where a second round of extensive hearings was held.[81]

A majority of the Senate Committee found the House Bill too restrictive and substituted language which would have permitted substantial expansion of TVA service. The

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[79] Id at p. 109.

[80] Id at p. 108.

[81] Hearings before Subcommittee of Senate Committee on Public Works, 86th Cong., 1st Sess., June 9-10, 1959 (H.R. 3460 and S. 931).

Senate Committee version contained only two basic restrictions on TVA service: (1) TVA was prohibited from serving any cities not served on July 1, 1957, having a population in excess of 5,000, or 10,000 in the case of cities owning their own electric systems, and (2) there was an overall limitation on the expansion of TVA service—TVA could not increase by more than the lesser of 2,000 miles or 2½%, "the area for which the Corporation was the *primary source of power supply* on July 1, 1959." Here, for the first time, the phrase "primary source of power supply" appears in the Bill, in substitution for the phrase "service area." As will be shown later, the phrases have the same meaning. A somewhat expanded list of excepted cities was also included in the Senate Committee version of the bill.

The Senate Committee version was unacceptable to a minority of the Committee, including Senator Randolph, who filed Supplemental Views dissenting from the Committee Report. Noting that TVA growth requirements had theretofore been controlled by Congressional appropriations and the "gentleman's nonencroachment agreement" between TVA and neighboring power companies, Senator Randolph concluded: "Since TVA expansion would no longer be controlled through the appropriation procedure, it is essential that limitations compatible with the gentleman's agreement now existing should clearly be established in this legislation."[82]

In accordance with the views expressed in his minority report, Senator Randolph proposed an amendment on the floor of the Senate which again rewrote the entire area

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[82] S. Rep. No. 470, 86th Cong., 1st Sess., July 2, 1959, p. 56, 2 U. S. Code Cong. & Ad. News, 86th Cong., 1st Sess., p. 2021 (1959).

limitation provisions. This amendment was passed by the Senate, referred to the House, and there passed and enacted into law.

Before considering in some detail the provisions of the Act as finally passed it should first be emphasized that the final version of the Act, the so-called "Randolph Amendment," was substantially different from the version reported out of the Senate Committee, and represented a return to the strict area limitation provisions of the House Bill (the Vinson Amendment) with certain carefully defined exceptions. In their Briefs to this Court and arguments to the courts below, petitioners have placed considerable emphasis upon the language of the Senate Committee Report. Such reliance on the language of the Senate Committee Report, relating to a version of the Bill which was not enacted, has resulted in a complete misreading of the Act by petitioners and has led them to the wholly insupportable conclusion that the area of Claiborne County served exclusively by KU on July 1, 1957, was somehow within the area for which TVA was the "primary source of power supply". We will now examine the several provisions of the Act in its final form.

1. *The area for which TVA or its distributors were the primary source of power supply.*

Petitioners' whole position in this case is based upon their contention that the area of Claiborne County served exclusively by KU and contiguous to the remainder of the KU service area in Kentucky, was somehow within a larger area, not otherwise defined by Congress, for which TVA was the "primary" source of power supply. The argument is that since the statute speaks of the area for which TVA was the "primary", as opposed to the "sole" source of

power supply, the so-called "primary area" must include some customers receiving electric service from another source. In this case the non-TVA customers so selected for inclusion in the "primary area" are the some 2,000 KU customers in the area of Claiborne County served exclusively by KU.

Under this theory, TVA is free to choose any point on the actual geographic boundary of its service area and arbitrarily reach out and include, as within its "primary area", adjacent areas served exclusively by other utilities. Congress obviously intended no such result when it substituted the "primary source" language for the phrase "service area."

In the course of the various hearings and debates on the TVA revenue bond financing bills frequent reference was made to the fact that TVA was the sole supplier of electric power in an area of approximately 80,000 square miles.[83] As stated by TVA's general counsel at the hearings before the House Committee, "The Tennessee Valley Authority is the sole source of power supply for an area of about 80,000 square miles."[84] Maps were exhibited to Committees of Congress to show in rough approximation this 80,000 square mile area.[85] In testifying as to how these maps were prepared, TVA's Manager of Power, Mr. Wessenauer, stated:

> "Well, the information basically was information which we had available to us in our files as to the general extent of the areas served by the individual municipal and cooperative distributors of TVA power, and

[83] E.g. Hearings before Subcommittee on Flood Control of House Committee on Public Works, 85th Cong., 1st Sess., TVA financing, March 28-May 7, 1957, p. 66-67 (No. 85-5, H.R. 3236 and 4266).

[84] Hearings, supra note 75 at p. 76.

[85] Id at p. 5, 14.

the lines were intended to be an approximation of the extent to which their lines *went geographically.*

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"And they were the best information we had in our offices at the time the maps were prepared. They were intended to give the general picture of where the distributors were, municipal and cooperative distributors *were carrying TVA power.*"[86]

The Senate Committee also noted that "TVA is the sole supplier of electric power for an area of about 80,000 square miles . . ."[87]

Both the House version of the Bill, which refers to the "service area" of TVA, and the language of the Act, which refers to the area for which TVA was the "primary source of power supply," refer to that geographic area of approximately 80,000 square miles where the consumers of TVA power were physically located on July 1, 1957. This was the area which had been basically stabilized under the "gentleman's agreements" and Congress did not intend to include within the area any adjacent areas being supplied with electricity from another source.

The Senate Committee objected to the use of the term "service area" as it appeared in the House version of the Bill, stating:

"The term 'service area' is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers."[88]

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[86] R. 291.

[87] S. Rep. No. 470, supra note 82 at p. 2.

[88] Id at p. 8.

"The contracts under which TVA sells power to distributors do not limit the area in which those distributors may sell power. Thus only a few of the distributors have a legally defined service area. The area where each distributor sells power is determined by community growth *and the relationship between neighboring distributors.* Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."[89]

Senator Randolph's Amendment, although returning to the House concept of restricting TVA to the area served in 1957, retained the Senate Committee phrase, "the area for which TVA was the primary source of power supply," rather than the "service area" language of the House.

In addressing the House just before final passage of the Act, Representative Vinson, in the course of explaining the several Senate amendments, stated:

"As we all know, the TVA service area today consists of about 80,000 square miles of territory. . . . In providing an area limitation, the Senate, instead of using the definition of 'service area,' which seemed to be confusing to some, referred instead 'to the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.'

. *"The words 'primary source of power supply on July 1, 1957' have the same meaning as the language 'service area of the Corporation as it existed on July 1, 1957.'"*[90]

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[89] Id at p. 9.

[90] 105 Cong. Rec. 14121 (July 23, 1959).

Representative Davis, floor manager of the Bill in House, also noted with respect to the Randolph Amendment that "This amendment accomplishes the same purpose as the corresponding provision in the House Bill of limiting the area within which TVA power may be made available to the general area supplied by power on July 1, 1957, but it provides a more workable formula."[91]

The reasons given by the Senate Committee for substituting the primary area language for "service area", i.e. (1) that TVA had no service area as such, its service area being that of its distributors, and (2) that there might be areas where the lines of the TVA distributors and other utilities were so interlaced that no definite boundary could be established, does not constitute any basis for an interpretation that the language was intended to permit expansion of TVA service beyond the existing boundary of that service in 1957, into areas where TVA was no source of power supply at all, much less the "primary source." There is a well-defined boundary between the respective service areas of KU and Powell Valley which has been respected by the parties in the past under the several territorial service agreements and was precisely defined on a detailed map prepared by KU and Powell Valley jointly. It cannot at this late date be argued that the lines of KU and Powell Valley are so "interlaced" that no determination of their respective service areas can be made. In fact, a line of Powell Valley crosses the KU service area at only one point in the 14 mile corridor from the Kentucky border to Tazewell, and at the point of the line crossing there are a cluster of four customers of KU.[92]

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[91] Id at p. 14114.

[92] Ex. 25—R. 386, 758; Ex. 24—R. 384, Ex. Vol. II, sheet 3b. (The line crossing area is shown at the top of the maps.)

Petitioners, relying on the Senate Committee Report, contend that Congress did not intend to establish a definite boundary line for TVA service, but desired some "elasticity and adjustment" at the discretion of the TVA Board. The Senate Committee did find "problems inherent in an attempt to establish a rigid boundary for limitation of power service." Thus:

> "The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power. The proposed amendment would permit an increase of the lesser of: (a) 2½ percent of the area for which TVA was the chief or principal supplier of power on July 1, 1957, or, (b) 2,000 square miles."[93]

And further believed that:

> ". . . the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise."[94]

A minority of the Committee, including Senator Randolph, felt otherwise. The Randolph Amendment was a return to the House concept of confining TVA service to its existing service area, and "elasticity and adjustment" at the discretion of the TVA Board was replaced by enumerated and clearly defined exceptions to the service area limitation.

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[93] S. Rep. No. 470, supra note 82 at p. 8.

[94] Id at p. 9-10.

Thus, Senator Randolph, in proposing his amendment on the floor of the Senate, stated:

> "It is evident that TVA expansion outside of its existing power system area can come about only through TVA acquiring customers who are now being served, directly or at wholesale, by utilities providing service in the adjacent area.
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> * * * * *
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> "Sound economic policy dictates that *well-defined service areas be established* in the public utility field.
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> * * * * *
>
> "Mr. President, I know it is the clear intent of the Senate Committee on Public Works — as it must have been the intent of the House — *to indicate clearly that authority is not to be given TVA, by general language, to engage in expansion* other than that occasioned by the normal growth of TVA's existing territory.
>
> "But the language used to spell out this desired result is, in my opinion susceptible of interpretations which might lead to the subsequent assertion that powers not now intended to be conferred actually have been made legal.
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> * * * * *
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> "It has been my privilege to join with the experienced and able junior Senator from Georgia [Mr. Talmadge] in the presentation of *definitive language* which preserves the original intent of the congressional mandate under which TVA came into existence.
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> "It seeks, however, and I believe effectively so, to clarify TVA's area of service."[95]

The Court of Appeals, following the clear Congressional mandate, correctly held that the existing boundary between

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[95] 105 Cong. Rec. 13060 (July 9, 1959).

the service area of Powell Valley and the service area of KU was the boundary of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.

As the petitioners do not claim that Powell Valley service in the KU service area of Claiborne County comes within any of the specified exceptions in the Act, our discussion of the statute could stop here. On the other hand, we believe that a brief discussion of these exceptions will serve to further illustrate the correctness of the holding of the Court of Appeals with respect to the meaning of the basic service area limitation.

2. *The exception for the five-mile growth area.*

As a compromise between the strict House version of the Bill (the Vinson Amendment) which would have confined TVA to its 1957 service area with no provision for growth, and the Senate Committee version which, with some exceptions, would have permitted unlimited expansion up to 2,000 square miles in any direction, the final Act permitted an expansion of five miles in areas contiguous to the TVA service area when *necessary* to care for the growth of TVA service *within* the area. This provision was taken from the original House version in which county boundaries were the determinative factor, and was added to alleviate the situation where TVA-served cities on the border of the TVA area might expand into adjacent areas by annexation or otherwise.[96] Consistent with the reason for this exception, municipalities receiving electric service

[96] See Hearings, supra note 75 at pp. 50-52; and see 103 Cong. Rec. 142205 (August 9, 1957) where the five mile provision was first included.

from another source, such as Tazewell and New Tazewell, were expressly excluded from the five-mile growth area.

The application of the statutory scheme to the facts of this case is perfectly clear. Under any rational interpretation of the Act, Tazewell and New Tazewell are outside the TVA service area. Although the two cities are within five miles of the boundary of the TVA service area, they were also incorporated municipalities receiving service from another source (KU) in 1957, and cannot be taken by TVA under the five-mile growth provision of the Act. This limitation was specifically designed to prevent the extension of TVA service into cities, such as the Tazewells, near its boundaries but served by other utilities.

3. *The exception for unserved areas within the area in which TVA had generally established electric service.*

Even if the Court were to accept the argument of TVA that Tazewell and New Tazewell were somehow inside the periphery of the TVA primary service area, the provisions of the statute discussed below would still prevent TVA service to the Tazewells.

The Senate Committee Report stated with respect to the House Bill:

> "*Within the general area* receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. . . . The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a *new* customer, even *within the general area it was already serving.*"[97]

[97] S. Rep. No. 470, supra note 82 at p. 9.

Senator Randolph, in his Supplemental Views, noted the existence of this problem; stating:

> "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957."[98]

With respect to this problem, an entirely new provision was inserted in the Randolph amendment as a compromise between the House and Senate Committee versions of the Bill, which provision is as follows:

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer *within any area* in which the Corporation or its distributors *had generally established electric service* on July 1, 1957, and to which electric service was *not* being supplied from any other source on the effective date of this Act."

The resulting compromise provision permits TVA and its distributors to serve new customers in isolated areas or islands wholly surrounded by the TVA service area, but only if they were not receiving electric service from another source on the date of the Act. The defendants argue that this provision of the Act does not mean what the language clearly dictates and what all of the legislative history expressly says that it means.

In attempting to avoid this further prohibition of TVA service in the Tazewells, Petitioners contend, and the District Court apparently agreed, that this provision of the Act has reference to some area beyond or outside the

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[98] Id at p. 56.

periphery of TVA's service area. There is nothing in the statute or its legislative history to support such a strained interpretation.

First, the statute clearly speaks of customers "within" any area in which TVA had generally established electric service. The legislative history makes clear that this provision concerns isolated islands surrounded by the TVA service area.

In the final House debate before passage of the Act, Representative Vinson explained to the House this new provision which the Senate had added, as follows:

> "[T]he amendment does permit TVA or its distributors to supply electric power to customers within the area in which TVA or its distributors had generally established electric service on July 1, 1957 so long as no electric service was being supplied to such customers from another source on the effective date of this act. *This is not intended as an enlargement of the existing territory, but only to permit TVA and its distributors to supply power to small,* **unserved** *islands or "isolated areas" within the general area already being served by TVA and its distributors."*[99]

As noted above, the Senate Committee desired to "permit minor adjustments *within,* and *around* the periphery of, the TVA area." In the final Act, the periphery problem was solved in the provision for the five-mile growth area. Problems of adjustments *within* the general area of TVA service were solved by the above provisions regarding islands within the general area of TVA service. In each instance in the Senate Committee Report where the phrase

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[99] 105 Cong. Rec. 14121 (July 23, 1959).

"general area" appears, the context in which such phrase is used demonstrates that the Committee had reference to areas within or surrounded by the TVA service area. For example, the Committee desired to "enable rural cooperatives to serve new rural customers *within the general area* which they now serve." Again the Report states, "*within the general area* receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors." Also, "the House bill would invite litigation anytime that a distributor of TVA power undertook service to a new customer, even *within the general area* it was already serving."

The only other place in the statute where the term "general area" appears is the provision

> "Nothing in this Chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same *general area* where TVA power is supplied to obtain TVA power."

This provision was placed in the Act by amendment on the floor of the House for the stated purpose of preserving the rights of two towns in Mississippi to obtain TVA power, as they were reported to be presently engaged in litigation seeking such power.[100] The two towns, Coldwater and Olive Branch, then served by other utilities, were in an area completely surrounded by the service area of TVA distributors.

The attention of Congress was thus directed to the problem of isolated areas not served by TVA but surrounded by such service and Congress solved the problem by permitting TVA service only to new customers in such isolated

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[100] 105 Cong. Rec. 7703 (May 7, 1959).

areas not receiving service from another source on the effective date of the Act.

Conversely, a reading of the legislative history demonstrates that the attention of Congress was at no time directed to any problem concerning isolated areas of TVA service somewhere beyond its primary service area and the five-miles adjacent thereto. TVA has admitted, and in fact strenuously argued, that the primary service area of TVA and its distributors is that geographic area of some 80,000 square miles where TVA power was being distributed in 1957. It is acknowledged by TVA that its "primary area" includes *all* of that geographic area where TVA distributors were supplying power in 1957. Neither in testimony before the committees of Congress nor in the evidence in this case is there any mention of any area outside of the approximately 80,000 square mile primary area of TVA service where there are any customers or facilities of TVA distributors. There may be such areas but there is no indication that Congress was ever apprised of that fact.

Congress was necessarily dealing with the problem at hand, islands of private power service surrounded by TVA service, and not some area outside the 80,000 square mile TVA area to which its attention was never directed and where TVA distributors had no "established" electric service at all.

4. *The exception as to specifically named cities and customers.*

The 1959 TVA Act contains, in addition to the provisions discussed above, an express exception permitting TVA service to twelve named cities in Tennessee, Kentucky and

Georgia. Of those twelve excepted cities eight—Dyersburg, Covington, Oak Ridge and South Fulton, Tennessee; Fulton and Hickman, Kentucky; and Chickamauga and Ringgold, Georgia—are completely surrounded by the service area of TVA distributors.

The petitioners contend that, even though no exception was made in the Act for the Tazewells, TVA service can be rendered to the towns because they are somehow inside the "periphery" of the TVA service area. If this contention were correct, there would be absolutely no need for the statute to expressly except any one of the eight named cities which are *in fact* surrounded by TVA service.

The net effect of petitioners' arguments is to ask this Court to substitute the Senate Committee version of the Bill, rejected by Congress, for the language of the Act as passed.

Thus, in the Brief for the Cities (p. 17), reference is made to the statement in the Senate Committee Report that the Committee Bill would "protect the right of certain communities to choose their power supply." Again, it is stated in the Brief for the Cities (p. 35) that the Senate Committee left the language of the Act "to some degree imprecise" because it believed it "desirable to authorize minor adjustments." A similar argument is made at page 22 of the Brief for the Cities where the language of the Committee Report is contrasted with the views of Senators Prouty and Randolph and these Senators are even described as "*opponents* of the final language of the bill." Senator Randolph was, of course, the *author,* rather than an opponent, of the final language.

Further, reference is made to a statement of Senator Cooper as supporting the interpretation placed upon the Act by petitioners (see Brief for Cities, p. 17). Senator Cooper was the author of the Senate Committee version, subsequently rejected by the Senate.[101] On the floor of the Senate he moved to strike the Randolph amendment in favor of the Senate Committee version. Speaking in support of the Senate Committee version, and against the Randolph amendment, he did make the statement quoted at page 17 of the Cities' Brief. He also made the following statements with respect to the Randolph Amendment:

> "I wish to note that in doing this I believe we have gone too far. One purpose of *my* amendment, permitting an *extension* of the service area, was to permit necessary adjustments between private utilities and TVA. Now, the *fixed area* provided by the amendment of the Senators from Georgia and West Virginia will mean that every time there is some little problem between a private utility and the TVA, the agency will be required to come to Congress to have it settled. The amendment which I offered would have permitted such adjustments between TVA and private utilities.
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> * * * * *
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> "I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.
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> * * * * *
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> "And it says to the *small communities on the perimeter,* 'You can never choose to secure power from TVA, even though your city councils and your people desire it.' "[102]

[101] 105 Cong. Rec. 13052 (July 9, 1959).

[102] Id at p. 13052-53.

Having lost the battle in Congres petitioners now seek redress here.

B. The Subsequent Legislative History.

The intent of Congress to fix a boundary around the TVA service area as it existed in 1957 and to prohibit TVA service to municipalities which were outside that area is again clearly demonstrated in the subsequent history of the Act.

In 1966, the TVA Act was amended to increase the amount of bonds which might be issued by TVA from $750,000,000 to $1,750,000,000.[103] In the course of this legislation representatives from Jackson Purchase Rural Electric Cooperative Corporation sought to have the Act amended to specifically accept Jackson Purchase from the territorial limitation provisions. A hearing was held before the Senate Committee on Public Works on July 22, 1966, and excerpts from this hearing were subsequently introduced into the Congressional record.[104] In the course of these hearings representatives from Jackson Purchase variously described the Jackson Purchase service area as being an "enclave" surrounded by the TVA area,[105] an "underdeveloped island,"[106] a "pocket of discrimination in the TVA area,"[107] and noted that "A TVA customer may be located on one side of the street and Jackson Purchase customers are located acros the street and in many instances even next door to each other."[108] Reference was also made to the fact that Jackson Purchase was a preferred customer under the

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[103] PL 89-537, 80 Stat. 346 (1966).

[104] 112 Cong. Rec. 16479 (Daily ed. July 27, 1966).

[105] Id at p. 16479.

[106] Id at p. 16480.

[107] Id at p. 16481.

[108] Id at p. 16479.

TVA Act and that the rate differential between TVA power and Jackson Purchase's present supplier was affecting the economy of the area.[109] Finally, for the above reasons it was suggested that an amendment excepting Jackson Purchase from the area limitation provisions would not change the Act but merely clarify what Congress originally intended.[110]

The Senate Committee, after noting the arguments of Jackson Purchase stated:

> "The committee feels that no matter how many changes are made in the territorial boundaries restricting the sale of TVA power, there will always be someone who is located on the periphery of the service area and denied service by the Tennessee Valley Authority. Thus, to change the boundaries to provide service for one area would merely create a similar situation elsewhere.
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> * * * * *
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> "Therefore, while the committee sympathizes with Jackson Purchase and others who desire to purchase TVA power, it feels that any change in the present authorized service area of TVA would only result in a contentious situation seriously handicapping the efforts of the Tennessee Valley Authority to operate in harmony with neighboring privately owned utilities."[111]

On the floor of the Senate during debate on the Bill, Senator Randolph reiterated the views of the Committee, as follows:

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[109] Id at p. 16482.

[110] Id at p. 16481.

[111] S. Rep. No. 1399, 89th Cong., 2nd Sess., p. 3-4 (July 22, 1966), 2 U. S. Code Cong. & Ad. News, 89th Cong., 2nd Sess., p. 2628-29 (1966).

"The committee, while sympathetic to the request of Jackson Purchase, considered it unwise to expand the territorial limits of TVA imposed by the 1959 act.

"As the Members of this body know, the Congress, after long and careful deliberation, established a territorial limitation in the act of 1959 on the service area of the Tennessee Valley Authority. The area thus established was defined as that for which TVA was the primary source of power on July 1, 1959, plus certain exceptions as set forth in the act.

"The expansion of TVA beyond its present *service area* is of great concern to the investor-owned utilities. Since the establishment of the territorial boundry in 1959, these companies have been free to develop their existing facilities and service area needs[112] without fear of losing their customers through further expansion of TVA beyond those 1959 boundary delineations.

"If Congress were to permit the expansion of TVA at this time to provide service to Jackson Purchase, it would open a Pandora's box. We would be besieged by requests from others on the periphery of the service area for similar treatment. This would only serve to disrupt and destroy the amiable relations between the Government-owned Tennessee Valley Authority and the private power companies that have existed since establishment of the territorial limitation in 1959."[113]

The arguments and considerations set forth in Point I of the Brief for the Cities for including the Tazewells

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[112] For example, in 1963 KU invested a substantial sum to rebuild its transmission line to Tazewell from 34.5 KV to 69 KV, which investment would be worthless to KU if Powell Valley were now permitted to serve the Tazewells (R. 444, 439).

[113] 112 Cong. Rec. 16477 (Daily ed. July 27, 1966).

within the TVA area are the same arguments and considerations unsuccessfully urged upon Congress by Jackson Purchase.[114] It could not be clearer from the wording of the Act, and the legislative history, including subsequent legislative history, that Congress did, in fact, intend to prohibit TVA distributors from supplying power to municipalities adjacent to the border of the TVA service area, and thereby to maintain the status quo as of 1957.

C. The basis for the Court of Appeals determination on the merits.

The Court of Appeals decision is based upon the undisputed facts as to the geographical boundary between the area served by KU in Claiborne County and the area served by Powell Valley. The facts as to the location of the boundary have been previously summarized in the Statement portion of this Brief.

On July 1, 1957, KU served 95.3% of the customers and delivered 94.1% of the energy consumed in the Tazewells and served more than one-third of the customers and supplied more than one-third of the energy in the whole county. The area in which this energy was supplied by KU is a corridor or peninsula extending from the border of Bell County, Kentucky, south and east for a distance of

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[114] Although petitioners have also complained that KU is "skimming off the cream" of the power business in Claiborne County by serving the heavily populated areas, as opposed to the rural area, Congress recognized that the continued financial soundness of public utilities was dependent upon its municipal business. We doubt if petitioners would question the fact that the REA program was designed for the purpose of subsidizing electric service to rural areas which could not feasibly be served by private investment. As the purpose of the REA loans to Powell Valley and other cooperatives is to provide rural service, we do not understand that they are now complaining of the necessity of performing this function.

some 15 miles to and including the Tazewells. KU is the sole source of power supply in Bell County, Kentucky, and its service area in Clairborne County, Tennessee is no more than a continuance of and part of the overall KU service area which extends up into Bell County and other areas throughout Kentucky.

Beginning in the Cumberland Gap area of Clairborne County adjacent to the Kentucky border, KU lines and customers extend uninterruptedly through the corridor to the Tazewells and on into the area southwest of New Tazewell. Within this corridor KU maintains a transmission line and approximately 90 to 100 miles of distribution lines[115] serving some 1,278 customers, in addition to the 561 customers served inside the towns. It is not claimed that there is any place within the 15-mile corridor or peninsula of KU service extending from the Kentucky border to the Tazewells where the lines and customers of KU are anywhere cut off or interrupted by a service area or customers of Powell Valley. In fact, only one line of Powell Valley crosses this KU corridor in the entire distance between the Kentucky border and Tazewell, and at the very point of crossing KU has a cluster of four customers.[116]

TVA and Powell Valley have in the past recognized this area of KU service both by territorial agreements and by numerous maps in evidence prepared by TVA which show the existence of this corridor contiguous to the rest of the KU service area in Kentucky.[117]

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[115] R. 407.

[116] Supra, note 92.

[117] Supra, note 19.

Two maps in particular were prepared for the express purpose of delineating the KU service area. The first of these maps was prepared by TVA in 1953 for the express purpose of showing "the area now served by LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the Cumberland Gap-Tazewell section of Tennessee."[118]

The second of these maps, the so-called Rowe-Osborne map,[119] was prepared in 1960, after the passage of the Act, for the express purpose of defining an exact boundary between the respective service areas. The accuracy of this map, its acceptance by the manager of Powell Valley and KU's manager in the area, and its subsequent use by them to resolve service area questions has not been disputed. This map alone is a complete answer to any contention that KU does not have a definite service area in Claiborne County or that no border can be established between the KU and Powell Valley service areas.[120]

TVA and Powell Valley do not deny: (1) the authencity of maps prepared by them to show the KU service area in Claiborne County; (2) the accuracy of the Rowe-

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[118] Ex. 36—R. 402, 769; R. 400.

[119] Supra, note 16.

[120] The Rowe-Osborne map is reproduced in two sections at R. 807-808 and somewhat more clearly at R. 973 (top half) and at Exhibit Vol. I, Sheet 4b (bottom half). It should be explained that this map was prepared to define the KU-Powell Valley boundary only and was not prepared to define the boundary between the KU service and the city of LaFollette's system to the west. Therefore, the eastern and southern boundary lines of the shaded KU area on the map represent the boundary between KU and Powell Valley. The wavy line on the west side of the shaded area with cross-hatch marks simply shows that LaFollette's service area is generally to the west of the KU area in that part of the county. The wavy line does not represent the boundary between KU and LaFollette and, in fact, the boundary is considerably to the west of the line in most instances.

Osborne map in defining the boundary between Powell Valley and KU; (3) the accuracy of the many exhibits showing the exact location of the respective customers and facilities of KU and Powell Valley; (4) the authenticity of 10 other maps published and distributed by TVA showing the KU corridor of service extending from Cumberland Gap to Tazewell; or (5) the fact that KU is rendering electric service all up and down its entire service area from the Kentucky border at Cumberland Gap, without interruption, to the Tazewells.

What, then, are the arguments which Petitioners advance for attacking the decision of the Court of Appeals on the merits of this case?

D. The basis of the TVA Board's determination.

On August 26, 1964—about three weeks before the trial of this action in the District Court, the TVA Board of Directors adopted the following resolution which Petitioners now contend is determinative of the merits of this case:[121]

> "Now, Therefore, Be It Resolved, That the Board of Directors hereby finds and determines that *all of Claiborne County, Tennessee,* is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957;
>
> "Further Resolved, That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia, and Kentucky and running first south and then west *along the line separating Tennessee and Kentucky* to the line dividing Claiborne and Campbell Counties, Tennessee, is part of the periphery of the area for which TVA or its distributors were the primary source of power supply on

[121] Ex. 93—R. 553, 796.

July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee."

As a statement of fact the resolution is simply incorrect.

As the basis for its resolution the TVA Board considered (1) a memorandum of G. O. Wessenauer,[122] TVA's manager of power, and (2) a memorandum from TVA's general counsel,[123] both dated August 25, 1964, the day before the resolution was adotped.

Mr. Wessenauer's memorandum first refers to a map of the lines and customers of the TVA distributors in Claiborne County.[124] No maps showing the location of KU's customers and facilities were supplied to the Board, notwithstanding the fact that the maps were available through discovery proceedings in this action. With reference to the map presented to the Board Mr. Wassenauer stated:

> "It will be seen that the lines of TVA distributors blanket Claiborne County *except* for the mountainous area, between the extreme northwestern part of the county served by LaFollette and Cumberland Mt. (which is without electric service except for a few customers served by Kentucky Utilities off a line running down Mingo Hollow) and *a small area near the point where Kentucky, Tennessee, and Virginia come together embracing Cumberland Gap, Harrogate, and Shawanee. Kentucky Utilities provides service to most of the consumers in Tazewell and New Tazwell, for a group of consumers near Arthur, and to scattered rural consumers, most of whom are in the area immediately south of Powell River.*"

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[122] Ex. 93 (8-26-64a)—R. 553, 800.

[123] Ex. 93 (8-26-64b)—R. 553, 804.

[124] Ex. 91—R. 552, Ex. Vol. I Sheet 1b.

Thus, Mr. Wassenauer himself acknowledged that the lines of the TVA distributors blanketed the county *except* for the very area in question here—the area from the Kentucky border at Cumberland Gap south and east through Harrogate, Shawanee, Arthur and on south of the Powell River to and including Tazewell and New Tazewell.

Mr. Wessenauer then recited the statistics concerning service by KU and the TVA distributors in Claiborne County as a whole, compiled from answers to interrogatories in this action, but made no mention of the statistics similarly compiled as to service in the Tazewells.

He then made reference to certain maps attached to his memorandum which had been exhibited by TVA at several of the congressional committee hearings during the consideration of the TVA bond legislation from 1955 through 1959.[125] With respect to these maps the memorandum states:

> "*The maps cannot be relied on to determine exact lines* but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA."

Finally, the memorandum refers to a map which Kentucky Utilities furnished to the House Committee on Public Works in connection with hearings on the 1959 TVA Act. Mr. Wessenauer notes in the memorandum that this map shows all of Claiborne County in the TVA service

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[125] Ex. 93 (8-26-64a)—R. 553, Ex. Vol. I Sheets 5b, 6b, 7b.

area, except for a small portion west of Cumberland Gap.[126] This map was filed in connection with the statement of Mr. R. M. Watt, Board Chairman of KU, at the hearings before the House Committee on Public Works. As previously noted,[127] Mr. Watt and other utility executives appeared at these hearings to protest against the original House version of the Act which would have permitted TVA service in the whole of any county partly served by TVA (i.e., Claiborne County) and as a result of such protests this version of the Bill was dropped in favor of the Vinson Amendment. The map referred to by Mr. Wessenauer was one of *two* maps presented by Mr. Watt in connection with his prepared statement delivered to the Committee for the sole purpose of opposing a bill which would have permitted TVA distributors to take KU's customers in Claiborne County, Tennessee. Both of the maps were supplied to TVA in answers to interrogatories in this action but only the first map was attached to Mr. Wessenauer's memorandum and presented to the Board. The reason for this is obvious. The second map[128] was designed for the express purpose of showing the existence of KU's service in Claiborne County and is the map to which Mr. Watt referred in his testimony as showing "one county in Tennessee in which the company renders service."[129] When questioned at the trial as to the reason why the second map was not also furnished to the Board, Mr. Wessenauer was forced to admit that he was not aware of its existence, even though both of these maps, together with the attached statement of Mr. Watt explaining the purpose of the maps,

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[126] Ex. 92 (8-26-64a)—R. 553, Ex. Vol. I Sheet 8b.

[127] See p. 49, supra

[128] Ex. 100 (8-26-64a)—R. 553, Ex. Vol. I Sheet 9b.

[129] Supra, note 78.

had come into the possession of TVA in the course of this action.[130]

In addition to Mr. Wessenauer's memorandum, the TVA Board of Directors was furnished with a memorandum of its general counsel. This memorandum stated:

> "From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) *with the possible exception of the area around Cumberland Gap,* is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. *A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap.* This is a matter for the Board to decide. It is my view that, *considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area,* the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell counties."

Based upon the above memoranda the Board made its determination that all of Claiborne County was within

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[130] R. 585-588.

the area for which TVA was the primary source of power supply.

In these memoranda three basic reasons are set forth for the inclusion of the whole of the county within the TVA service area: (1) TVA distributors served most of the county; (2) certain maps exhibited to Congressional Committees by TVA witnesses showed all of the county within the TVA area; and (3) the KU service area was "relatively small."

With respect to the first of these contentions, the fact that TVA distributors supplied approximately two-thirds of the electric energy consumed in the county and its lines "blanketed" all of the county *except* for the KU service area from the Kentucky border south to the Tazewells, cannot, as a matter of law, form the basis for a conclusion that the whole of the county was in the TVA area. Congress considered and rejected a bill which would have provided that TVA could serve the whole or any county which was partially served by TVA in 1957, in favor of the present Act restricting TVA service to the area for which it was the primary source of power supply, irrespective of county boundaries. The Bill was so amended because of objections of utility company witnesses at the hearings, which witnesses included Mr. Watt of KU, who specifically objected to the possible effect which the language would have on KU's service area in Claiborne County.

With respect to the maps exhibited by TVA witnesses at Congressional hearings, it is obvious that Congress did not intend that the TVA service area should be conclusively presumed to be the area shown on some of the maps exhibited in the course of some Congressional hearings.

The Court of Appeals properly rejected this contention (375 F.2d at p. 412) and we would not be disposed to argue this point further, except for the fact that the maps apparently formed the basis for the District Court's opinion in this action.

The District Court, after referring to the determination of the TVA Board of Directors, concludes:

> "At the time of the determination, the Directors had before them the four maps that were submitted to the Congress by the witnesses for TVA.
>
> "The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.
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> "The finding of the Board was made in good faith and supported by substantial evidence.
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> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957." (237 F. Supp. at p. 514)

In view of this language in the District Court opinion we feel it is necessary to make at least some comment on these maps. All of these maps[131] are large scale maps of the southeastern United States which were admittedly

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[131] Supra, note 125.

"rough approximations"[132] and not "offered as accurate representations of service area."[133] In fact, the maps differ from each other in substantial respects in depicting TVA's service area. The TVA Board was so advised in Mr. Wessenauer's memorandum to the Board.

A determination that Congress intended to define the TVA service area by reference to certain large scale, inaccurate and inconsistent maps which the majority of the members undoubtedly never saw borders on the frivolous.

Finally, there is the conclusion reached by TVA's general counsel in his memorandum to the Board that because the KU service area in the vicinity of Cumberland Gap was "relatively small" the Board could properly "resolve this question by finding that all of Claiborne County" was within the TVA service area. If this logic be accepted, TVA distributors could extend their service to any adjacent area of private utilities' service regardless of the five-mile and other limitations in the Act. The whole purpose of the territorial limitation provisions would be quickly undermined if TVA were permitted to arbitrarily include within its service area any adjacent "relatively small" areas served by other utilities.

In view of the fact that TVA expressed doubts as to whether its primary service area should include the area around Cumberland Gap served exclusively by KU, one is prompted to ask why the TVA Board did not fix the periphery of its service area just south of Cumberland Gap. On closer examination the reason becomes obvious. If the TVA Board were to concede that *factually* Cumberland

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[132] R. 583.
[133] R. 570, 292.

Gap were a part of KU's service area there would be no other place, consistent with such fact, to fix the periphery unless it were south of the Tazewells, at the actual border of the KU-Powell Valley service areas.

Cumberland Gap is a community adjacent to the Kentucky-Tennessee border. Bell County, Kentucky, across the border, is served exclusively by KU as is Cumberland Gap on the Tennessee side. There are no facilities of any TVA distributor anywhere near Cumberland Gap. The service area, facilities and customers of KU are continuous, uninterrupted and unbroken from Cumberland Gap at the state line down to and including Tazewell and New Tazewell. If TVA were to concede that its periphery should dip down to exclude from its area Cumberland Gap, or any part of KU's service area in the county, then there would be no place where TVA could factually establish the location of its periphery so as to include the Tazewells within the TVA service area. Anywhere the TVA Board might select, between Cumberland Gap and Tazewell, to fix the boundary of its area, there would be KU service on *both sides* of the line.

For these reasons TVA is forced to select the Kentucky-Tennessee line at Cumberland Gap—despite the fact that the area on both sides of this line is served exclusively by KU—and then attempt to support such location of its periphery by resorting to arguments with respect to maps used before Congressional Committees, to the county-wide approach specifically rejected by Congress, and the meaningless assertion that KU's service area is a "relatively small" area.

The Court of Appeals properly considered and rejected each of these untenable and "unreasonable" arguments.

III.

In rejecting the determination of the TVA Board in this action the Court of Appeals properly exercised its function of judicial review.

Petitioners contend that the interpretation placed upon the Act by the TVA Board of Directors was a "reasonable" one, and the Court of Appeals therefore erred in not "deferring to" or accepting the Board's conclusions.[134] In fact, the Court of Appeals considered each of the factors upon which the Board based its conclusion and properly rejected them as having no support in the language or history of the Act and thus, necessarily, "unreasonable." The real issue is simply whether the Court of Appeals should have accepted the Board's interpretation of the statute even though the Court's interpretation, based upon the language of the Act and its intent as disclosed by the legislative history, compelled a contrary conclusion. The

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[134] TVA apparently concedes that the Board's determination constituted a conclusion of law, a matter of statutory interpretation (See Brief for TVA, pp. 22-29). The Cities, however, do imply that the conclusions of the Board were findings of fact which should be upheld if supported by "substantial evidence" (See Brief for Cities, pp. 41-45). There is no finding of fact in dispute in this case and the sole question is the proper interpretation of the Act in light of the admitted and undisputed facts. In any event, the "substantial evidence" rule applies to "substantial evidence on the record as a whole" in quasi-legislative or quasi-judicial proceedings before administrative agencies. See 5 USC § 1009(e). The several cases cited in the Brief for the Cities in support of the substantial evidence doctrine are therefore not in point, e. g., *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, *Illinois Central R. R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 17 L ed 2nd 162; *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726; *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394.

answer to this question was clearly stated by this Court in *NLRB* v. *Brown*, 380 U. S. 278, 291:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions."

The question of the scope of judicial review of administrative action is admittedly a perplexing one and not susceptible to the application of precise verbal formula, there being "no talismanic words that can avoid the process of judgment." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 489. A comparison of certain of the cases cited in petitioners' Briefs with other decisions of this Court illustrates clearly the inapplicability of any hard and fast rules in the determination of the proper scope of review.

For example, in *NLRB* v. *Hearst Publications*, 322 U. S. 111, the Court reversed a judgment of the Court of Appeals which had set aside a determination of the Board that newsboys were "employees" within the meaning of the National Labor Relations Act, stating that the determination of the Board had "reasonable basis in law." Conversely, in *NLRB* v. *Highland Park Mfg. Co.*, 341 U. S. 322, a reversal by the Court of Appeals of a Board determination that the CIO was not a "national or international labor organization" within the meaning of the Labor Management Relations Act, was affirmed, despite the contention of the Board that its interpretation of the act was "reason-

able'' and should be sustained under the doctrine of *Hearst Publications.*[135]

Again, in *Gray* v. *Powell,* 314 U. S. 402, the Court sustained the determination of the Director of the Bituminous Coal Division, reversed on appeal, that a railroad was a ''producer'' of coal. But subsequently in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, the Court rejected a finding of the Price Administrator, affirmed by the Emergency Court of Appeals, that a warehouse was not a ''public utility'' within the meaning of the price control laws, stating:

> ''If Congress had deemed it necessary or even appropriate '' at the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.'' (321 U. S. at p. 156).

The Court, on occasion, has in the same case deferred to an agency determination on some issues while reaching its own conclusions on others, independent of the agency determination[136] or contrary to it.[137] And the number of

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[135] Compare *United States* v. *Drum,* 368 U. S. 370, with *ICC* v. *J-T Transport Co.,* 368 U. S. 81, and *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83.

[136] See *Unemployment Compensation Comm'n* v. *Aragon,* 329 U. S. 143.

[137] See *NLRB* v. *Coca-Cola Bottling Co.,* 350 U. S. 264.

dissenting opinions in the above cited cases and others cited in the petitioners' Briefs on this point, attests to the difficulty of formulating any precise rules of law on the question and the consequent necessity of deciding each case on its own particular facts and circumstances.

It nevertheless appears from the welter of decided cases that there are certain underlying factors or considerations which influence the extent to which the courts will defer to administrative interpretations of law. If the determination is made in furtherance of a broad scheme of administrative regulation entrusted by Congress to the agency; or if administrative "expertise" is required to properly determine the question; and if the agency's interpretation of the law accords with the general statutory purposes, is directed to achieving the results intended by Congress, a degree of judicial deference may be appropriate. On the other hand, where such factors or considerations are not present, as in the instant case, and where the question is whether the agency has acted contrary to express statutory limitations on its powers, it is the function of the judiciary to determine if the agency has acted unlawfully.

This Court has permitted the broadest discretion to those agencies who are charged by Congress with the responsibility of administering federal regulatory statutes, and required to act thereunder as rule making bodies or administrative tribunals in the regulation of private individuals and businesses. Most of the cases cited in the petitioners' Briefs on this question involve such agencies and concern appeals from formal proceedings before administrative

tribunals.[138] On the other hand, determinations not made in such adversary proceedings "are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions" *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, 290.

Here, of course, TVA is not charged with the responsibility of regulating the business of public utilities operating in areas adjacent to the TVA service area. On the contrary, the 1959 TVA Act simply prohibits TVA from expanding its geographic service area and thereby encroaching upon the adjacent areas being served by other utilities. As pointed out by the Court of Appeals (375 F. 2d at p. 415), Congress did not, under the act, delegate to the TVA Board of Directors any policy making duties with respect to this limitation on its activities.

The determination of the TVA Board in this case that it was not acting contrary to statutory restrictions on its own electric service cannot be equated with policy making decisions of regulatory agencies acting under a broad mandate from Congress.[139] This case does not even concern the

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[138] See, e.g., *Gray* v. *Powell*, 314 U. S. 402, 411, where the court stated:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4-II(I) and 4-A, the function of review placed upon the courts by § 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."

[139] For example, petitioners seek to compare the determination of the Board in this case with a determination by the SEC that there was no "loss of substantial economies" within the meaning of the Public Utility Holding Company Act, 15 USC § 79k(b)(1)(A),

propriety of TVA's activities under the mandate of the original TVA Act,[140] but the construction of a statute which spells out in considerable detail the permissible geographic limits of TVA's power service. As seen previously the term "area" in the statute, which petitioners contend is too broad a term to permit of application without resort to administrative construction, was clearly intended by Congress to refer to the geographic area where the customers and lines of the TVA distributors were physically located on July 1, 1957. Thus, Senator Randolph stated:

> "Mr. President, I know it is the clear intent of the Senate Committee on Public Works—as it must have been the intent of the House—to indicate clearly that authority is not to be given TVA, by *general language,* to engage in expansion other than that occasioned by the normal growth of TVA's *existing territory.*"[141]

It is obvious that Congress intended to place clearly defined limitations on the expansion of TVA power service, and the mere fact that TVA must initially determine whether it is acting lawfully in contracting for the sale of electric power in a given area does not mean that the courts are required to defer to such initial determination. For, indeed,

> "Every statute to some extent requires construction by the public officer whose duties may be defined

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SEC v. *New England Electric System,* 384 U. S. 176; or whether products were of "like grade and quality" within the meaning of the Robinson-Patman Act, 15 USC § 13(a), *FTC* v. *Borden Co.,* 383 U. S. 637; or whether activities constitute "unfair methods of competition" under § 5 of the Federal Trade Commission Act, 15 USC § 45(a), *FTC* v. *Brown Shoe Co.,* 384 U. S. 316.

[140] The original act authorized TVA to sell and distribute electric power "equitably among the states, counties, and municipalities within transmission distance." 16 USC § 831j.

[141] 105 Cong. Rec. 13060 (July 9, 1959).

> therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform." *Roberts* v. *United States,* ex. rel. *Valentine,* 176 U. S. 221, 231.

If the initial determination by the TVA Board as to the meaning of the statutory prohibition on expansion of its service area was wrong, it was the duty of the Court of Appeals to so hold.

Another related factor considered by this Court in determining the permissible scope of judicial review of administrative action is the degree of administrative expertise which may be required to properly apply statutory language to a given case. Petitioners suggest that "determining the *appropriate* area in which to confine distribution by a vast power complex" requires the application of a high degree of expertise on the part of the TVA Board of Directors, armed with "familiarity with local conditions in the Tennessee Valley region and by knowledge and experience of the economics and technology of the electric power industry."[142] The answer to this contention is surely that Congress determined the "appropriate area" in which TVA was to confine its electric power distribution by the enactment of the 1959 TVA Act. Familiarity with local conditions in the Tennessee Valley and economic and technological experience in the electric power industry cannot form the basis for a determination of the geographic area in which TVA service was being supplied in 1957. As stated by the Court of Appeals in this case:

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[142] See Brief for TVA, p. 28.

> "Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board." (375 F.2d at p. 415)

In seeking to magnify the role of expertise in construing the act, TVA poses the following questions in its Brief (p. 26):

> "On the relevant date, TVA supplied more than half of the total electric power consumed in the State of Kentucky. Is all of Kentucky, therefore, within the TVA primary area? Or should the area be determined, rather, on a county-by-county, or even a municipality-by-municipality, basis? Must political subdivisions be used at all, or should the primary area be delineated in accordance with historic marketing patterns in the electric industry? May still other factors be relevant?"

It does not attempt to supply the answers to the posed questions, although the answers are quite evident. The boundaries of states, counties and municipal subdivisions are obviously not relevant factors. Congress expressly rejected a version of the statute which would have been based on political boundaries after it was pointed out that this would result in the possibility of considerable expansion of TVA's existing service area. With respect to "historic marketing patterns in the electric industry," Congress specifically selected one "historic pattern," the geographic area where the TVA customers were located on July 1, 1957. This is the only relevant factor.

In any event, as shown previously, the determination of the TVA Board in this case was not based upon reasons of economics, technology or "historic marketing patterns,"

but upon the fact that TVA served most of Claiborne County on July 1, 1957, and had on occasion exhibited maps to Congressional Committees considering the TVA bill, incorrectly showing the approximate area of TVA service to include all of Claiborne County. Neither here nor in the lower courts have petitioners pointed to any economic or technical factors as being determinative and the correctness of the Board's determination must be judged "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196; *Burlington Truck Lines* v. *United States*, 371 U. S. 156.

The controlling facts, the location of the customers and lines of the TVA distributors and the customers and lines of KU in Claiborne County on July 1, 1957, were never in dispute and after the passage of the Act representatives of KU and Powell Valley, working together, prepared a map accurately defining the boundaries of their respective service areas. Under these circumstances the application of the Act to the given facts was not a matter for administrative expertise to which the Court of Appeals should defer. Rather, it was the function of the Court, in the normal exercise of its judicial duties, to interpret the statute in light of the undisputed facts.

The primary, overriding factor in determining what deference, if any, the courts should give to an administrative interpretation of a statute is whether or not the agency's determination is consistent with the purposes of the Act. As an initial premise, a statute "must be read in the light of the mischief to be corrected and the end to be attained." *NLRB* v. *Hearst Publications*, 322 U. S. 111, 124. See *ICC* v. *J-T Transport Co.*, 368 U. S. 81, 107, 127-28 (concurring opinion of Frankfurter, J.). In this

regard it must be significant that the petitioners, in asserting the reasonableness and therefore finality of the TVA Board's determination, do not once allude to the purpose of the territorial limitation provisons. Surely, the "mischief" to be corrected is the taking of existing customers of public utilities by distributors of TVA power, and the "end to be attained" is the prevention of destructive competition by TVA distributors with adjacent utilities. The determination of the TVA Board in this case is utterly inconsistent with both the letter and the purpose of the Act.

Finally, this Court has been historically most reluctant to defer to agency determinations when the issue is whether the agency has exceeded its statutory authority or acted contrary to a statutory prohibition against agency action. Thus, in *Peters* v. *Hobby*, 349 U. S. 331, the Court struck down a finding of the Loyalty Review Board of the Civil Service Commission, made after a hearing conducted by the Board on its own initiative. The Executive Order establishing the Board authorized such hearings only on petition of the employee in question or his employing agency. In upholding the right of the employee to challenge the action of the Board in a declaratory judgment action, the Court stated:

> "Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." (349 U. S. at p. 345)

Again, in *Leedom* v. *Kyne*, 358 U. S. 184, the National Labor Relations Board included both professional and non-professional employees in a collective bargaining unit, without first taking a vote among the professional employ-

ees, contrary to the provisions of Section 9 of the National Labor Relations Act (29 USC § 159(b)) which Section expressly provided that the Board should not designate such a unit unless a majority of the professional employees voted for inclusion. The Board contended that its action could not be challenged in an original suit, review of its action being limited to the review procedures provided in the Act. In rejecting this contention the Court stated:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U. S. at p. 188).

In the case at bar the question is whether TVA, in contracting for the sale of electric power in an area heretofore served exclusively by KU, was acting contrary to an express statutory prohibition. Under such circumstances "an agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U. S. 358, 369.

Conclusion

For the reasons set forth above, the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

H. R. 3460 as introduced in the House of Representatives on January 27, 1959:

> "It is hereby declared to be the intent of this Act that the power facilties built or acquired with the proceeds of such bonds or power revenues shall not be used, without prior approval by Act of Congress, for the sale or delivery of power by the Corporation outside the counties which lie in whole or in part within the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957, except, when economically feasible, to serve the United States or agencies thereof or to interconnect with other utility systems for exchange power arrangements, or to interconnect Tennessee Valley Authority generating plants, or to serve existing rural electric cooperatives (as same now exist as to area and as of July 1, 1957) now being served in part by the Tennessee Valley Authority: Provided, further, That except as expressly provided above, all contracts entered into after this provision becomes law for the supply of power to any distributor shall contain an agreement by said distributor to confine the resale of such power within the boundaries of the counties above described and such additional areas (not more than five miles from such boundaries) as may be necessary to care for the growth of communities within said counties provided said communities were receiving Tennessee Valley Authority power on July 1, 1957."

H. R. 3460 as reported out of the House Committee on Public Works with the Vinson amendment, April 14, 1959:

> "Unless otherwise specifically authorized by Act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be

used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except when economically feasible for exchange power arrangements with other utility systems with which the Corporation had such arrangements on said date. Nothing herein contained shall prevent the Corporation from continuing service to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; and South Fulton, Tennessee; or agencies thereof: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as reported out of the Senate Committee on Public Works on July 2, 1959:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale of power (except with such States, counties, muicipalities, corporations, partnerships, or individuals with which the Corporation had such contracts on July 1, 1957) which would make the Corporation a source of power supply for any city which owned its power distribution system on July 1, 1957, having a population in excess of ten thousand, or to any other city having a population in excess of five thousand, according to the latest Federal census, or which would in any event, increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser, no part of which may be in a State not now served by the Corporation, nor more than five hundred square miles of which may be in any one State now served by the

Corporation or its customers), the area for which the Corporation was the primary source of power supply on July 1, 1957; Provided, however, That in addition to the extension of the service area authorized in this subsection, nothing herein contained shall prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association, and for the rural customers in the areas now served by the said East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists."

H. R. 3460 as finally enacted with the Randolph amendment:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be

necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State not now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; *Hickman, Kentucky;* Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauder-

dale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association [and for the rural customers in the areas now served by the said East Mississippi Electric Power Association] Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power." (Additions to the Randolph amendment shown in italics, deletions shown in brackets.)

SUPREME COURT OF THE UNITED STATES

Nos. 40, 50, AND 51.—OCTOBER TERM, 1967

Edward J. Hardin, as Mayor of Tazewell, Tennessee, et al., Petitioners, v. Kentucky Utilities Company. (40)	On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Powell Valley Electric Co-operative, Petitioner, v. Kentucky Utilities Company. (50)	
Tennessee Valley Authority, Petitioner, v. Kentucky Utilities Company. (51)	

[January 16, 1968.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The question for decision in these cases is whether Congress has prohibited the Tennessee Valley Authority from competing in the sale of electricity with respondent, the Kentucky Utilities Company, in two small villages in Claiborne County, Tennessee, and in a narrow corridor between the two villages and the Tennessee-Kentucky state boundary 16 miles away. By § 15d of the TVA Act of 1959, Congress barred the TVA from expanding its sales outside "the area for which the Corporation [TVA] or its distributors were the primary source of power supply on July 5, 1957,"[1] and our problem is

[1] Tennessee Valley Authority Act, § 15d (a), 73 Stat. 280, as amended 73 Stat. 338 (1959), 16 U. S. C. § 831n–4 (a) (1966). The full text of the relevant portion of § 15d (a) is as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of

therefore the narrow one of deciding whether these villages and the narrow corridor are part of an "area" for which TVA was the primary source of power on the crucial date. The difficulty lies in determining the location and extent of the "area" to which the statute refers. In June 1957, TVA supplied 62% of the power used in all of Claiborne County, and therefore if the entire county is an "area" within the meaning of the statute, TVA would have been the "primary" source of power, and its expansion into the two villages would be permissible. On the other hand, in the villages themselves, TVA supplied only 6% of the power in June 1957, while respondent supplied 94%; thus if the two villages either alone or with the corridor constitute an "area," TVA would not have been the primary source

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power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

of power, and it would be barred by § 15d from expanding into that area.

The question of statutory interpretation now before us arose in this way. TVA is the major supplier of electric power in Tennessee and in many adjoining areas of Alabama, Mississippi, Georgia, Virginia, and Kentucky. Respondent, whose service area is centered in Kentucky, has long served customers in Tazewell and New Tazewell, the two villages within 16 miles of the Kentucky border in Claiborne County, Tennesseee. The power lines of TVA distributors also crisscross Claiborne County, and TVA has therefore been able to serve a small number of customers in the two villages, even though respondent was the predominant source of power. Because Kentucky Utilities' retail rates for electricity in the two villages were approximately 2½ times higher for typical consumers than the rates for TVA power,[2] the value of residential and commercial properties served by TVA was substantially and uniformly higher than the value of similar properties served by respondent. This rate disparity created a seething discontent among residential and industrial consumers in the villages. Pointing out that they lived in the very heart of the TVA watershed and in immediate proximity to TVA's large Norris Lake, these citizens contended that it was wholly unjust and inequitable to deny them the benefits and advantages of cheap TVA power. After complaints, planning, and consultations over a period of more than three years, the local governments engaged a contractor to build the facilities necessary to establish a municipal system linked to TVA's cheap power. Kentucky Utilities' customers immediately began to discontinue their service and become customers of the municipal system.

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[2] For the owner of an electrically heated home, TVA power might cost $30.50 for a winter month as against $75.53 for the identical amount of power supplied by respondent.

Kentucky Utilities then filed this suit against TVA, the mayors of the two Tazewells, and the Powell Valley Electric Cooperative, a TVA distributor, charging them with conspiracy to destroy its Tazewell business and asking the court to enjoin TVA from supplying power to the new municipal system in alleged violation of § 15d. The District Court upheld the determination of the TVA Board of Directors that the two Tazewells were within TVA's primary service "area" and dismissed the case, 237 F. Supp. 502 (1964), but the Court of Appeals reversed, holding that the two villages plus the corridor constituted an "area" and that TVA accordingly was barred from extending its service in the Tazewells. 375 F. 2d 403 (1966). We granted certiorari, 386 U. S. 980 (1967), to resolve this important question in the administration of the TVA Act. We reverse and agree with the District Court that the TVA Board properly determined the relevant service "area" to extend beyond the two Tazewells and to include the entire county. TVA, as the primary power source within this area, could therefore properly make its low-cost power available to consumers in this entire county area including the two villages.

I.

Before discussing the merits, we shall briefly consider petitioners' contention that the Kentucky Utilities Company lacks standing to challenge the legality of TVA's activities. We agree with both the courts below that this contention is without merit. This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of his competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U. S. 166 (1881); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U. S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940). But competi-

tive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U. S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co.* v. *United States*, 315 U. S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83 (1958).

Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in § 15d of the 1959 Act was to protect private utilities from TVA competition. This is evident from the provision itself and is amply supported by its legislative history. The provision grew out of TVA's efforts to find some way to meet the cost of new facilities without dependence upon annual appropriations from Congress. In 1955 TVA began to seek authority to issue bonds to finance these expenditures. Although TVA spokesmen assured Congress that the objective was not territorial expansion but only improvement of facilities in TVA's existing service area, many members of Congress were apprehensive and thought that if congressional budgetary control was to be weakened, some substitute to prevent territorial expansion should be found. A series of bills to give TVA borrowing power failed to pass.[3] Several bills were then introduced combining the grant of borrowing power with various provisions to prohibit territorial expansion,[4] and one of these bills was eventually

[3] S. 2373, 84th Cong., 1st Sess. (1956); H. R. 4266, 85th Cong., 1st Sess. (1958).

[4] S. 1855, S. 1869, S. 1986, S. 2145, 85th Cong., 2d Sess. (1959); S. 931, H. R. 3460, 86th Cong., 1st Sess. (1959).

enacted as the TVA Act of 1959. Although discussions of the territorial limitation mentioned a number of policy reasons for the restriction,[5] it is clear and undisputed that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation.[6] Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944); cf. *United States* v. *ICC*, 337 U. S. 426, 433–434 (1949), and no explicit statutory provision is necessary to confer standing.[7]

II.

Basic to our consideration of the merits of this case is an appraisal of the significance of the TVA Board's determination that all of Claiborne County, including

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[5] One of the Senators active in framing the territorial limitation mentioned concern over TVA's powerful bargaining position with respect to its purchase of coal. See S. Rep. No. 470, 86th Cong., 1st Sess., p. 54 (1959) (Supplemental Views of Senator Randolph).

[6] See, *e. g.*, *id.*, at 9 (majority report); *id.*, at 54–55 (Supplemental Views of Senator Randolph); 105 Cong. Rec., p. 13053 (July 9, 1959) (remarks of Senator Cooper); *id.*, at 13054 (remarks of Senator Holland); *id.*, at 13055 (remarks of Senator Kerr); *id.*, at 13060–13061 (remarks of Senator Byrd); hearings on H. R. 3460 before House Committee on Public Works, March 10–11, 1959, 86th Cong., 1st Sess., pp. 110, 115 (testimony of Representative Vinson); *id.*, at 122 (testimony of Representative Boykin).

[7] Petitioners' reliance on *Kansas City Power & Light Co.* v. *McKay*, 96 U. S. App. 273, 225 F. 2d 924 (C. A. D. C. Cir.), cert. denied, 350 U. S. 884 (1955), is thus misplaced. The Court in *McKay* ruled that an explicit statutory provision was necessary to confer standing because of the "long established rule" that an injured competitor cannot sue to enforce statutory requirements not designed to protect competitors. In the case of statutes concerned with protecting competitive interests, the "long established rule" is of course precisely the opposite.

the two Tazewells, constituted a single "area" in which TVA is the primary source of power. Petitioners argue that the Court of Appeals gave no weight whatever to this determination and urge that the finding should instead have been treated like an administrative interpretation by an agency or executive officer, to be set aside only if it is not properly related to the purposes of the statute. The opinion of the Court of Appeals is not altogether clear in dealing with this question, however,[8] and respondent has not attempted to argue here that the Court of Appeals could have decided the matter entirely on its own, without any consideration of the TVA Board's finding. Rather, respondent appears to agree with petitioners that the determination of the TVA Board is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute, and we think this is the proper rule. The initial determination as to the extent of the "area" under § 15d must be made by the TVA Board in every case, since TVA is required under the 1959 Act to make power available to public bodies and cooperatives within the permissible area.[9] In making this determination as to the most appropriate boundaries for its service area, the TVA Board will normally evaluate the economic and

[8] The Court of Appeals stated at one point:

"But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority." 375 F. 2d, at 412.

Later in its opinion, however, the court suggests that this statement was not intended to deny any role to the Board's determination:

"We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on appeal." 375 F. 2d, at 415.

[9] See § 12 of the 1959 Act.

engineering aspects of providing its service to the customers in question, especially in relation to the particular topography of the affected region. Given the innate and inevitable vagueness of the "area" concept and the complexity of the factors relevant to decision in this matter, we think it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take the TVA's "area" determinations as their starting point and to set this determination aside only when it lacks reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion. Cf. *SEC* v. *New England Electric*, 384 U. S. 176, 185 (1966); *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109–110 (1904).

III.

Tested by this standard, we think the determination of the TVA Board with respect to Claiborne County should have been upheld by the court below. Neither the language of § 15d, its legislative history, nor any of the economic and technical circumstances of this particular locality suggest that the TVA Board's determination here exceeded the outer boundaries of choice contemplated in the Act.

Certainly nothing in the language of § 15d (a) itself forecloses the TVA's present decision. The second paragraph of that section reads:

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

In light of this provision, respondent argues that even *within* its "area," TVA may not extend its services to

new customers previously served by a private company. Literally, of course, this language does not establish such a rule. It simply states that when a customer is served by a private utility in this area of generally established service, an area perhaps broader than the "area" of primary service which is controlling under the first paragraph of § 15d (a), the Act *may* prevent TVA from supplying the customer; other parts of the subsection must be looked to for the actual prohibition. This literal reading, moreover, is the only appropriate one in light of other provisions of the statute. The first paragraph of § 15d (a) authorizes TVA to provide power not only within its "area" but also within an additional region "extending not more than five miles around the periphery of such area"; this is followed by a proviso denying TVA the right to serve within this additional region any "municipality receiving electric service from another source on or after July 1, 1957." Since the Act makes the existence of a private supplier an explicit bar to TVA expansion only within the additional region, we cannot read the statute as also making the existence of a private supplier, in and of itself, an automatic bar to expansion in the primary service "area."

The parties have also called our attention to numerous incidents in the legislative history suggesting that Congress may have regarded the very villages involved in this case as either inside or outside of TVA's service area. Petitioners note that maps placed before the congressional committees showed the Tazewells as within TVA's primary service area. Respondent counters that one map submitted to the House Public Works Committee showed the Tazewells as within respondent's service area. In addition, respondent notes that a "gentlemen's agreement" between TVA and neighboring private utilities had placed the Tazewells within respondent's area, and respondent refers to a number of statements

indicating that various sponsors of the territorial limitations intended to enact the "gentlemen's agreement" into law.

We do not find any of this information particularly helpful in resolving the question before us. The maps on which petitioners rely were large-scale representations of TVA's entire multistate system, and they were submitted to various committees for general reference. Even if all these maps had placed the Tazewells in the same area, it would be artificial in the extreme to assume that Congress actually entertained any specific intention with respect to these small villages in one tiny portion of the county, the State and the map. With respect to the "gentlemen's agreement," it is undeniable that many members of Congress did hope to freeze completely the existing situation by enactment of the territorial limitation. Others, the majority of the Senate Public Works Committee in particular, undoubtedly sought to include language that would authorize adjustments and permit a certain amount of elasticity in the availability of TVA service. We think it is sufficient to note, without tracing all the changes in the wording of the territorial limitation, that the language of the Act in its final form is a compromise and that the views of those who sought the most restrictive wording cannot control interpretation of the compromise version.

Finally, we think that apart from the structure of the Act and its legislative history, the facts of the situation in Claiborne County, in Tennessee, and in Kentucky support rather than undercut the TVA Board's determination. The parties place great stress on the question whether respondent's service area should be characterized as a "peninsula" attached to its main region of service or as a mere "island" surrounded by TVA territory and therefore more properly subject to TVA intrusion. But we can attribute no controlling significance to such char-

acterizations. The most isolated area of private service will necessarily be connected to the private company's main area by at least one power line such as the one present here, and the company may even, as here, serve scattered customers along the line—if indeed the region contains any customers to serve. At the same time a broad area served almost entirely by a private company and contiguous with its main service area may be crisscrossed by the lines of TVA distributors and TVA may even have scattered customers along these lines; the fact that the private company was thus surrounded by TVA might not under this statute justify TVA expansion into the "peninsula" or "island," whatever it may be, served by private power. In the present case respondent did serve a substantial number of customers in the corridor between the Tazewells and its main service area in Kentucky, but if a "peninsula," it was at best a very narrow and tiny one in relation to the possible patterns of power distribution. TVA, on the other hand, served most of the rural areas in Claiborne County and had a substantial minority of the customers in the Tazewells themselves. Under these circumstances, the TVA Board could properly have concluded that the pattern of electrical distribution would be more sensible and efficient if TVA competed in the entire Tazewell municipal area as well as serving the relatively unprofitable rural customers, many of whom were rather close to respondent's transmission line into the Tazewells. In addition, the Board could have considered the existence of its significant, though not primary, service in the Tazewells themselves as a compelling reason for including these villages in its "area," since the factors supporting inclusion were in any event significant and since the great disparity of rates in the villages had resulted in significant economic dislocations.

Under all these circumstances we cannot say that the conclusion of the TVA Board in the present case is incompatible with the "area" concept formulated in the Act. We therefore reverse the judgment of the Court of Appeals and affirm that of the District Court.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 40, 50, AND 51.—OCTOBER TERM, 1967.

Edward J. Hardin, as Mayor of Tazewell, Tennessee, et al., Petitioners, v. Kentucky Utilities Company. (40)	On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Powell Valley Electric Co-operative, Petitioner, v. Kentucky Utilities Company. (50)	
Tennessee Valley Authority, Petitioner, v. Kentucky Utilities Company. (51)	

[January 16, 1968.]

MR. JUSTICE HARLAN, dissenting.

These cases present a narrow question of statutory construction, upon which differing views might reasonably be entertained. I cannot, however, agree that the position now adopted by the Court will satisfactorily achieve the purposes evidently sought by Congress in 1959. I therefore respectfully dissent.

The scope of judicial review of administrative action is, of course, governed principally by the terms and purposes of the underlying statutory system. Compare generally 4 Davis, Administrative Law Treatise § 30.03 (1958); Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239; Jaffe, Judicial Control of Administrative Action 546 ff. (1965). The purposes of these statutory provisions are uncommonly plain. The Court acknowledges, as it must, that "it is clear and undisputed

that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the [service area] limitation." *Ante*, p. —.

The provisions in question were expected to protect private utilities by "defin[ing]" and "limit[ing]" the "working arrangement that now exists with respect to" the Authority's service area. S. Rep. No. 470, 86th Cong., 1st Sess., 8. They were thus intended to constrict the Authority's discretion as to the expansion of its area of service. It is no disparagement of the Authority to recognize that an orderly system of law does not place the enforcement of a restraint upon discretion into the unfettered hands of the party sought to be restrained; surely, therefore, the scope of judicial review of proceedings involving such limitations should be measured generously.

The role of the courts should, in particular, be viewed hospitably where, as here, the question sought to be reviewed does not significantly engage the agency's expertise. This is a case "where the only or principal dispute relates to the meaning of the statutory term," *NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583, 591; it may, as Judge Friendly has noted, therefore appropriately be denominated a "question of law." *Ibid.* It presents issues on which courts, and not the Authority, are relatively more expert. See 4 Davis, *supra*, at § 30.04. No doubt "economic and engineering aspects," *ante*, p. —, including topography, may influence the Authority's wish to expand its area of service, but such factors can hardly prescribe the terms or stringency of Congress' prohibitions against expansion.

In light of these considerations, I am unable to accept this decision, the effect of which is to restrict severely the scope of judicial review of the Authority's determinations under § 15d (a). The Court forbids reviewing courts to set aside such determinations unless they lack "rea-

sonable support," and then discovers such support here in the most minimal evidence.[1] At bottom, the support adduced for this determination by the Court consists of two facts: first, the Authority's distributor served on July 1, 1957, eight customers in New Tazewell and 20 customers in Tazewell;[2] and second, at least some of the other residents of the two municipalities quite understandably would prefer to pay the lower rates for electrical power charged by the Authority.[3] If these facts illustrate the "reasonable support" demanded by the Court, Congress' stringent limitation upon the Authority has proved extraordinarily fragile.[4]

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[1] It should be noted that the agency determination upon which the Court places so much weight was reached at a "special meeting" of the Board of Directors on August 26, 1964, more than eight months after respondent filed its complaint, and only three weeks before trial. One of the staff memoranda upon which the determination was based refers specifically to this litigation. One might have supposed that a determination which was made *post litem motam* warranted at least cautious treatment.

[2] The Court's choice of descriptive phrase is noteworthy. The Court suggests that the Authority's distributor served "a substantial minority" of the customers in the two Tazewells. The District Court found, in fact, that on July 1, 1957, respondent served 95.3% of those customers. 237 F. Supp. 502, 513.

[3] The Court intimates darkly that "economic dislocations" have occurred. The pertinent evidence appears to consist at bottom of allegations that housing and other forms of economic development tend to locate in areas in which the Authority's less expensive electrical power is available. Surely the Court does not suppose that Congress in 1959 was unaware that the Authority's electrical power is relatively inexpensive, or that it did not recognize that those who reside outside the Authority's service area would find it economically desirable to have that area extended so as to include themselves.

[4] It is pertinent to note that neither of the two staff memoranda upon which the Authority's belated determination was explicitly based included among the "facts which appear to be relevant" (Memorandum from the Manager of Power to the General Manager, Tennessee Valley Authority, August 25, 1964, 2 Transcript of

Neither the statute nor the pertinent legislative history provides any formula for the precise measurement of the Authority's service area. However, given Congress' clear purpose to restrict stringently the expansion of the area served by the Authority on July 1, 1957, I think that the emphasis placed by the Court of Appeals on the number of customers served on that date by respondent and the Authority offers the basis of a sensible and practical standard. Certainly Congress did not wish or expect that, as this Court now holds, the question should be left largely, if not entirely, in the hands of the Authority. I would therefore affirm the judgment below for the reasons given in Judge O'Sullivan's opinion for the Court of Appeals, 375 F. 2d 403, supplemented by the considerations discussed in this opinion.

Record 801) any references to "economic and engineering aspects" (*ante*, p. —), or even to any "economic dislocations" (*ante*, p. —). Whatever the relevance of these factors in the eyes of the Court, the Authority's staff appears to have thought them immaterial. The determination itself does not, of course, refer to these factors.